

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 3 70

THE UNITED STATES OF AMERICA *EX REL.* LOUISVILLE
CEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

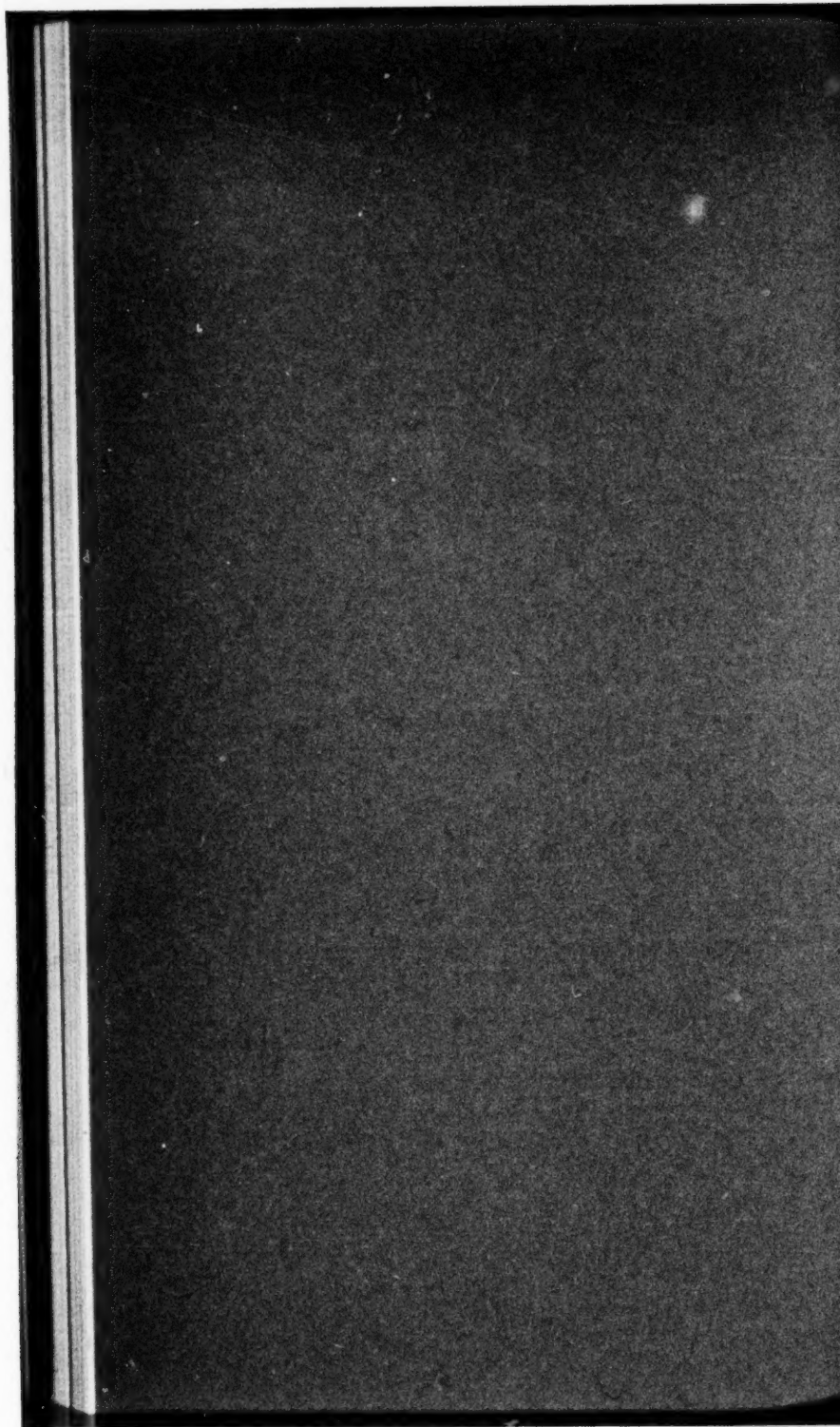
INTERSTATE COMMERCE COMMISSION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

FILED DECEMBER 31, 1917.

(25,057)

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(25,057)

SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES OF AMERICA EX REL. LOUISVILLE
CEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

INTERSTATE COMMERCE COMMISSION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
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INDEX.

	Original.	Print
Caption	<i>a</i>	1
Transcript of record from the Supreme Court of the District of Columbia	1	1
Caption	1	1
Petition	1	2
Exhibit A—Report of Commission.....	7	8
Rule to show cause	10	10
Marshal's return	10	11
Answer	10	11
Exhibit A—Report of Commission.....	12	13
Reply to petitioner	15	16
Exhibit "A"—Order of Commission.....	15	16
Opinion of court	16	17
Order denying prayers of petition; discharging rule and dismissing petition; taxing costs against petitioner.....	17	18
Order noting appeal and fixing penalty of bond.....	17	18

	Original. Print.	
Memorandum: \$50 deposited in lieu of appeal bond.....	17	18
Assignment of errors	18	19
Designation of record	19	20
Clerk's certificate	19	20
Minute entry of argument	20	21
Opinion, Shepard, C. J.....	21	21
Judgment	24	24
Assignments of error	25	24
Petition for writ of error.....	28	26
Minute entry of order allowing writ of error.....	31	28
Writ of error	32	28
Bond on writ of error.....	33	29
Citation and service	34	30
Clerk's certificate	35	31

Transcript of Record.

Court of Appeals of the District of Columbia, October Term, 1914.

No. 2737.

No. 19, Special Calendar.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

Appeal from the Supreme Court of the District of Columbia.

Filed August 21, 1914; printed September 10, 1914.

In the Court of Appeals of the District of Columbia.

No. 2737.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

Supreme Court of the District of Columbia.

At Law. No. 56830.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition.

Filed April 17, 1914.

In the Supreme Court of the District of Columbia.

Law. 56830.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent.

To the Hon. Justice of the Supreme Court of the District of Columbia holding a District Court:

The petitioner, the Louisville Cement Company, a corporation respectfully shows unto your Honor.

I. That it is advised that this Honorable Court has original jurisdiction in mandamus for and in respect to matters and things in this petition hereinafter set forth.

II. Petitioner states that it is a manufacturing corporation duly organized and existing under the laws of the State of Kentucky and is engaged in the manufacture of Cement at Speeds, Indiana.

III. (a) That the respondent, The Interstate Commerce Commission, is a body organized under and by virtue of an act entitled "An Act to Regulate Commerce," approved February 4, 1887 (24 Stat. L., 379); and acts amendatory thereof and supplementary thereto (25 Stat. L., 855; 26 Stat. L., 743; 28 Stat. L. 643; 34 Stat. L., 584; 34 Stat. L., 838). That said respondent is an administrative, quasi-judicial tribunal which by said act has heretofore been invested with certain powers, duties and authority in respect to awards of damages to complaints for a violation by carriers of provisions of said acts as provided in sections 13 and 16 of said Act of February 4, 1887, as amended.

(b) That among other duties imposed upon the respondent herein as provided in section 12 of said Act that "The Commission is hereby authorized and required to enforce provisions of this Act."

That among other provisions of said act there is one provision in section 16 thereof as follows:

"That if, after hearing a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of the Act, for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

It is further provided in section 16 of said Act as follows:

"All complaints for the recovery of damages shall be filed with the Commission within two years, from the time the cause of action accrues and not after * * *."

IV. (a) That heretofore, to wit, on November 15, 1911, the peti-

tioner, being one of the parties entitled so to do pursuant to section 15 of the Act to Regulate Commerce, filed a petition in the office of the respondent against the Louisville & Nashville Railroad Company, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, as defendants, said defendants being common carriers between points in Kentucky and points in other states and as such common carriers each was and is subject to the provisions of the said Act to Regulate Commerce.

That said proceeding is Number 5256 on the docket of the respondent.

(b) That the defendant, Louisville & Nashville Railroad Company thereafter in accordance with said Act to Regulate Commerce and pursuant to the rules adopted and promulgated by the respondents, filed an answer to said petition in which it admitted the allegations contained in said petition.

(c) That thereafter to wit, on June 20, 1913, in accordance with said Act to Regulate Commerce, a full and complete hearing upon the matters involved was held at Louisville in the State of Kentucky.

(d) That thereafter permission for the purpose having been granted, briefs were filed on behalf of the petitioner, but no brief was filed on behalf of the defendants, they having admitted the facts and agreed that an order for reparation or damages as prayed should be issued.

(e) That thereafter, to wit, on October 7, 1913, respondent, in accordance with the Act to Regulate Commerce made, entered and filed a report in said proceeding, by which it was decreed that the rate of \$1.10 per ton charged petitioner was unlawful to the extent that it exceeded \$1.00 per ton; that petitioners have an award of damages in the sum of \$595.65 being the difference between \$1.10 per ton, the rate charged, and \$1.00 per ton, the rate held to be lawful, on shipments moving between February 1, 1907, and April 10, 1907, but further decreed that said respondent had no jurisdiction to award damages for unlawful charge on shipments moving prior to February 1, 1907, it being decreed that the claim as to shipments moving prior to said date was barred by the period of limitations fixed by said act on the ground that the "cause of action" as used in said act accrued upon the delivery of said shipments and not upon the payment of the unlawful charge thereon and that the letter of petitioner to respondent under date of April 19th, 1907, did not suffice to stop the running of said limitation; that said report is to be found in volume XXVIII of the reports of the Interstate Commerce Commission at page —; that a certified copy of said report and opinion is attached hereto as "Exhibit A," and it is prayed that same be taken and read as part hereof.

(f) That petitioner, being advised that the said report and opinion in said proceeding of Louisville Cement Company v. Louisville & Nashville Railroad Company et al., were erroneous as matters of law, did thereafter, to wit, on the 6th day of March, 1914, file with said respondent, in accordance with section 16a of the said Act to Regulate Commerce, a petition for a rehearing alleging as ground

for such application that the Commission erred as a matter of law in holding that it is without jurisdiction over claims for damages arising more than two years after the shipments involved were delivered, but less than two years from the time the alleged unlawful charge was paid or, in other words, that the Commission erred in holding that the "cause of action" accrued when the shipments were delivered rather than when the alleged unlawful charge on same was paid and alleging further that the Commission erred, as a matter of law, in holding that the letter of petitioner to respondent under date of April 19th, 1907, did not suffice to stop the running of limitation as to the shipments set forth by petitioner in its complaint to respondent; that said petition for rehearing was denied by respondent on the 16th day of March, 1914.

V. The petitioner states that the relief sought by its petition to the Interstate Commerce Commission in case \pm 5356 filed November 15, 1911, was an award of reparation or damages on certain shipments of coal from Jellico, Kentucky, and Woodbine, Kentucky, to Speeds, Indiana, made between July 28, 1906, and April 9, 1907; that it was alleged and admitted in said proceeding that the rate on shipments of coal between said points had for many years
4 prior to July 22, 1906, been One Dollar (\$1.00) per ton but on said date the Louisville & Nashville Railroad Company published a supplement to its tariff and by said amendment, through a typographical error, said rate was made One Dollar and Ten Cents (\$1.10) per ton instead of One Dollar (\$1.00) per ton; that said rate of \$1.10 per ton was unlawful to the extent that it exceeded One Dollar (\$1.00) per ton; that the Louisville & Nashville Railroad did not discover said mistake in its tariff until about February 19, 1907, and that petitioner did not discover said mistake until it received a letter written by Louisville & Nashville Railroad Company on February 19, 1907, calling attention to the fact that the published rate was \$1.10 per ton, and that petitioner thereafter paid freight on all shipments of coal made from February 11, 1907, to April, 10, 1907, inclusive, at the rate of \$1.10 per ton, said freight so paid, in excess of what the freight would have been at the rate of \$1.00 per ton, amounting to \$595.15; that on March 8, 1907, defendant issued an amendment to said tariff restoring the rate of \$1.00 per ton from said points to Speeds, Indiana, effective April 10, 1907, and that during the period from July 22, 1906, when the tariff embracing said rate of \$1.10 published by mistake became effective until April 10, 1907, when it was corrected, a large quantity of coal was shipped from the mines at Jellico and Woodbine, Ky., to the petitioner at Speeds, Indiana, but that all said coal shipped prior to February 11, 1907, was billed on the basis of the old rate of \$1.00 per ton, and the charges settled on that basis; that under date of April 19, 1907, petitioner addressed a letter to the Interstate Commerce Commission at Washington, D. C., which read as follows:

April 19, 1907.

Interstate Commerce Commission, Washington, D. C.

DEAR SIR: In re rates on coal from coal mines located on the Knoxville & Cumberland Valley Division of the L. & N. R. R. to Speeds, Ind.

Amendment No. 8 to L. & N. F. O. 888, I. C. C. A-8023, effective May 1st, 1906, made rate on coal from the mines located on the Knoxville & Cumberland Valley Div. of the L. & N. to Speeds, Ind., from Group # 1, \$1.00 per ton, and from group # 2, \$1.15 per ton, the usual difference between these two groups being 15c per ton.

Amendment # 14 to the same tariffs, effective June 9/06, re-issued this rate of \$1.00 from group 1 and \$1.15 from group # 2.

In issuing amendment # 18, to the same tariffs, effective July 22/06, through a typographical error, the rate to Speeds, Ind., from group # 1 was made \$1.10 per ton instead of \$1.00, the rate from group # 2 remaining \$1.15.

On commencing shipments of coal, to our plant at Speeds, Ind., in February of this year, the agent at Grays, Ky., inserted the usual rate of \$1.00 per ton, but on notice being given by the Auditor's office of the L. & N. that the rate should be \$1.10, corrected billing was issued, and the coal re-billed at \$1.10 per ton from group # 1.

We called the attention of the freight officials of the L. & N. to this apparent error and they can find nothing in their files authorizing or warranting the apparent increase from \$1.00 to \$1.10 per ton.

Under date of March 8th, they issued a new amendment #26 to L. & N. tariff G. F. O. 888, #30 I. C. C. A-8023, restoring the rate of \$1.00 per ton from group #1 to Speeds, Ind., to correct the typographical error in amendment #18.

Under the circumstances, will your honorable body authorize the L. & N. to refund this overcharge of 10c per ton on all shipments of coal from February 1st to April 10th, the date when the corrected amendment went into effect, on coal from group #1, to Speeds, Ind., the rate of \$1.10 per ton as issued in amendment #18 being excessive as compared with the rates in effect at the same time from group #1 to other points, and particularly with respect to group #2 to the same point.

We are satisfied the L. & N. R. R. Co., would be willing to refund this overcharge provided authority is given by your honorable body.

Awaiting your reply,

Very truly,

LOUISVILLE CEMENT CO.,
By HENRY S. GRAY, *Sec'y*.

That thereafter it took up said matter with the Louisville & Nashville Railroad Company and requested it to unite with petitioner in an application to the Interstate Commerce Commission for authority to permit Louisville & Nashville Railroad Company to refund said overcharge to petitioner, but the Louisville & Nashville Railroad Company refused to do so unless petitioner would pay to it the 10

cents per ton which it had failed to collect from petitioner on shipments made from July 23, 1906, to February 11, 1907, and that under date of August 20, 1907, the Louisville & Nashville Railroad Company presented to petitioner a bill for \$1,335.25 under charges on the shipments moving from July 22, 1906, to February 11, 1907, and stated to petitioner that if petitioner would pay to it the amount of said bill it would take up with the Interstate Commerce Commission the matter of refunding said amount and also said \$595.15 already paid; that petitioner believed that it ought not to be required to pay to said Louisville & Nashville Railroad Company said sum of \$1,335.25, which said Louisville & Nashville Railroad Company admitted to be due to it only as the result of its own mistake in publishing said rate of \$1.10 per ton, and which said Louisville & Nashville Railroad Company admitted that it ought not to be permitted to retain, if collected, and that for that reason plaintiff did not pay to said defendant said additional sum of \$1,335.25 until the 8th day of February, 1911, although payment thereof was repeatedly demanded by Louisville & Nashville Railroad Company, that petitioner at last paid said sum only because it had finally concluded that it might be subject to heavy penalties if it did not do so and that if said sum was not voluntarily paid plaintiff could be compelled to pay the same.

VI. Petitioner is advised that as a matter of law the cause of action set forth in its petition to respondent accrued when the alleged unlawful charge was paid and not when the shipments were delivered and petitioner is further advised that its letter to respondent under date of April 19, 1907, was sufficient to stop the running of the period of limitation as to all claims arising out of the erroneous publication of the rate of \$1.10 therein referred to.

Petitioner is also advised that the said respondent has exclusive jurisdiction in respect to numerous provisions of the said Act to Regulate Commerce and particularly with respect to the award of damages for a violation of said act; and that respondent is charged with the duty of executing and enforcing each and every provision of said Act; that when specifically charged with such duty said respondent can exercise no discretion in respect thereto.

VII. That petitioner has no appeal or review by way of appeal or otherwise from the decision of the respondent in case No. 5356; that said Act to regulate commerce provides no remedy by which an order refusing to take jurisdiction of a complaint or petition before the Commission can be reviewed or reconsidered otherwise than by rehearing, and petitioner having applied for a rehearing and said rehearing having been denied the petitioner is without remedy to proceed in respect to the matters and things alleged in said original petition save only and excepting by application to this Honorable Commission to comply with the duties and obligations imposed upon it by the said Act to regulate commerce.

Wherefore, the premises considered, petitioner prays that your Honor grant a rule directed to the respondent to show cause by a time limited in said rule why the said respondent should not take jurisdiction of the matters and things alleged in the complaint of

the petitioner, being No. 5356, on the docket of said respondent, and why it should not take jurisdiction of the claim of petitioner for an award of damages on account of overcharge on the shipments, set up in petitioner's complaint before respondent, moving from Jellico and Woodbine, Kentucky, to Speeds, Indiana, between July 28, 1906, and February 11, 1907, as required by the Act to Regulate Commerce.

2. That this Honorable Court direct the respondent to certify to this Honorable Court the records and proceedings in said proceeding, that this Court may hear and determine whether or not said respondent has jurisdiction of the matters and things in said petition set forth;

3. That this Court issue to respondent the peremptory writ of mandamus requiring and commanding the said respondent to take jurisdiction of the matters and things set forth in said petition;

4. That this Court issue the peremptory writ of mandamus directed to the respondent commanding and directing it to execute and enforce the said act, and particularly in respect to requiring the defendants in case No. 5356, to take jurisdiction as required by the Act to Regulate Commerce, of petitioner's claim for damages on account of alleged overcharge on shipments moving between July 28, 1906, and February 11, 1907, said overcharge having been paid by petitioner to the Louisville & Nashville Railroad Company on the 8th day of February, 1911, and petitioner having filed its petition to recover damages on account of said overcharge on the 15th day of November, 1911.

5. And for such other and further relief as the petitioner may be entitled to in the premises.

LOUISVILLE CEMENT COMPANY,
By J. V. NORMAN, *Attorney.*

Affiant, William S. Speed, says that he is President and Chief Officer of the petitioner, Louisville Cement Company, and that the statements contained in the foregoing petition are true as he verily believes.

WILLIAM S. SPEED.

Subscribed and sworn to before me a Notary Public in and for the County of Jefferson, State of Kentucky, by William S. Speed, personally known to me to be the President of the Louisville Cement Company, this 15th day of April, 1914. My Commission expires February 3, 1918.

[SEAL.]

J. V. NORMAN,
Notary Public, Jefferson County, Kentucky.

EXHIBIT A.

Interstate Commerce Commission.

No. 5356.

LOUISVILLE CEMENT COMPANY

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

Submitted August 14, 1913; Decided October 7, 1913.

Reparation awarded on account of an unreasonable rate charged for the transportation of shipments of coal in carloads from North Jellico and Wilton, Ky., to Speeds, Ind., delivered at the latter point between February 1, 1907, and April 10, 1907.

Reparation denied on shipments delivered at Speeds before February 1, 1907, on the ground that the complaint was not filed with the Commission within two years from the date the cause of action accrued.

Hines & Norman for complainant.

J. M. Dewberry for Louisville & Nashville Railroad Company.

Report of the Commission.

By the COMMISSION:

Complainant is a corporation with principal office at Louisville, Ky., and is engaged in the manufacture of cement at Speeds, Ind. In its petition, filed November 15, 1911, it is alleged that defendants charged an unreasonable rate for the transportation of coal in carloads from North Jellico and Wilton, Ky., to Speeds. Reparation is asked. The shipments of coal on which reparation is asked were made during the period from July 23, 1906, to April 9, 1907.

It appears that the Louisville & Nashville established and maintained from mines on its line within what is known as Group No. 1 in the state of Kentucky, a rate of \$1 per net ton on coal in carloads to Speeds for sometime prior to July 22, 1906. North Jellico and Wilton are included within the territory which is covered by Group No. 1 in the tariff. On July 22, 1906, a supplement to the Louisville & Nashville tariff became effective which named a rate of \$1.10 per ton on coal in carloads from the points of origin here involved to Speeds. The shipments of coal to Speeds from the mines in question were billed from Woodbine, Ky. The agent at Woodbine, not having been advised of the publication of the \$1.10 rate, continued to bill the shipments at \$1, and complainant paid no more than that rate up to February 11, 1907. Shortly previous to the last-named date the agent of the Louisville & Nashville discovered that

the \$1.10 rate had been published, and thereafter collected that rate on shipments made by complainant.

April 19, 1907, the complainant addressed a letter to the Commission explaining that the rate on coal from North Jellico and Wilton to Speeds had by mistake been increased 10 cents a ton, and that the increase had remained in effect from July 22, 1906, to April 10, 1907. This letter was received by the Commission April 22, 1907. In the letter the complainant asked the following:

Under the circumstances, will your honorable body authorize the Louisville & Nashville to refund this overcharge on all shipments of coal from February 1 to April 10, the date when the corrected amendment went into effect? * * * We are satisfied the L. & N. R. R. Co. would be willing to refund this overcharge provided authority is given by your honorable body.

On April 22, 1907, complainant was advised by the Commission by letter, that if the Louisville & Nashville would file with the Commission an admission that the rate from the points in question to Speeds was increased through error and ask authority to make refund, the subject would receive consideration. Complainant was also advised that if the Louisville & Nashville was not willing to submit the case in this manner it would be necessary for complainant to file formal complaint.

It appears that complainant at once took the matter up with the officials of the Louisville & Nashville upon receipt of the Commission's letter. The Louisville & Nashville refused to submit the case to the Commission until complainant had paid undercharges on shipments which had been made during the period from July 22, 1906, to February 10, 1907, amounting to \$1,335.25. The amount of reparation sought by complainant on shipments made after the \$1.10 rate was collected was \$595.65. The result of continued negotiations between complainant and the Louisville & Nashville was that in February, 1911, the complainant paid the carrier \$1,335.25; and complainant now asks the Commission for an order for reparation in the sum of \$1,930.90.

The facts are admitted. The Louisville & Nashville asserts that it never intended to establish the rate of \$1.10. It further agrees that an order for reparation should be issued. We are of opinion that under the circumstances the \$1.10 rate was unreasonable to the extent it exceeded \$1. The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation in the Act:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.

The Commission holds that the date the cause of action accrues is the date of the delivery of the shipment. *Blinn Lbr. Co. v. S. P. Co.*, 18 I. C. C. 430. The filing with the Commission of a letter which gives the name of the complainant, the shipments on which reparation is asked, the points of origin and destination, and the rates on which the claim is based, is held to be sufficient to stop the running of the statute. *Woodward & Dickerson v. L. & N. R. R.*

Co., 15 I. C. C. 170; *Youngblood v. T. & P. Ry. Co.*, 21 I. C. C. 569; *Marian Coal Co. v. D. L. & W. R. R. Co.*, 27 I. C. C. 441. The letter written by complainant and filed with the Commission April 22, 1907, referred only to shipments made by complainant from February 1, 1907, to April 10, 1907. This letter gave sufficient details with respect of the shipments made between the dates named to stop the running of the statute. No complaint was filed by complainant with reference to shipments made before February 1, 1907, until the petition here in question was filed on November 15, 1911; and these shipments had all been delivered more than four years before the filing of that petition. They are therefore barred from our consideration.

With respect to the shipments that moved after February 1, 1907, and up to April 10, 1907, a different situation is presented. Complaint was filed with the Commission with respect to these shipments within the statutory period. That the complaint was not promptly prosecuted before the Commission was due, apparently, to negotiations that were had between the complainant and the Louisville & Nashville. There is no indication in the record that complainant ever abandoned its claim for reparation with respect to the shipments which moved during the period covered by the letter filed April 22, 1907. Under these circumstances we hold that as to shipments made by complainant during the period from February 1, 1907, to April 10, 1907, the complaint was filed in time to stop the running of the statute. We further find that the rate of \$1.10 per ton paid by complainant was unreasonable to the extent that it exceeded \$1 per ton; that complainant was damaged and is entitled to reparation on all shipments made by it from the points of origin in question to Speeds between February 1, 1907, and April 10, 1907, on which it paid \$1.10. From this record, however, the amount of the reparation can not be ascertained. The complainant should prepare a statement showing as to each shipment the date of delivery of the shipment, weight, car number, and the amount of reparation asked on the basis above indicated. This statement, together with the freight bills, should be presented to the defendants for verification by them. When the statement has been so prepared and verified it should be forwarded to the Commission with the freight bills, when the matter will be taken up with a view to the issuance of an order for reparation.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary*.

A true copy:

GEORGE B. MCGINTY, *Secretary*.

Rule to Show Cause.

Filed May 20, 1914.

* * * * *

Upon consideration of the petition for a writ of mandamus in the above entitled cause it is by the Court this 20 day of May, 1914.

ordered that the respondent, the Interstate Commerce Commission be, and it is hereby, required to show cause on or before the 15th day of June, 1914, why a writ of mandamus should not issue as prayed: Provided, that a copy of this order shall be served upon said respondent on or before the 25th day of May, 1914.

THOS. H. ANDERSON, *Justice.*

(*Marshal's Return.*)

Served copy of within rule to show cause on Interstate Commerce Commission by service on George B. McGinty, secretary.
May 20, 1914.

MAURICE SPLAIN, *Marshal.*
C. R. S.

Answer.

Filed June 12, 1914.

* * * * *

The Interstate Commerce Commission, respondent in the above-entitled cause, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the relator's petition contained, for answer thereunto, or unto so much or to such parts thereof as this respondent is advised is material for it to make answer unto, answering says:

I. This respondent denies the allegations contained in paragraph I of said petition.

II. This respondent admits the allegations contained in paragraphs II and III of said petition.

III. This respondent admits the allegations in paragraph IV of said petition made under the sub-heads (a), (b), (c), (d), and (e), excepting this:

That said proceeding before the Commission is No. 5356 upon its docket; and that the facts, and action taken by this respondent in said proceeding, are set forth in its said report dated October 7, 1913, a copy of which report is hereto attached, marked "Exhibit A," and the same is made a part of this answer. That in so far as the facts set forth in said paragraph IV of said petition are contrary to, or are modified by, the facts set forth in its said report this respondent denies the same; and for a statement of the facts and its conclusions thereon, this respondent refers to its said report.

This respondent denies that in said proceeding and the action taken therein, it committed any errors of law, as set forth in subdivision (f) of said paragraph, of which this court, in this cause has jurisdiction.

IV. This respondent, answering paragraphs V, VI, and VII of said petition, neither admits nor denies the allegations of fact therein contained, except as the same have been herein, and are in

its said report controverted; and this respondent presents its said report, attached hereto, as its answer to said paragraphs and leaves the relator to make such proofs in support of the allegations in said paragraphs as it may deem necessary and the court may adjudge relevant and proper.

V. This respondent, further answering said petition and the several allegations therein, says that the matters and things heard and determined by this respondent in the said proceeding before it, No. 5356, were and are matters and things within its jurisdiction and power to determine under and by virtue of the Act of Congress entitled "An Act to regulate commerce" as amended; that all parties interested therein were fully notified of said proceeding and hearing; that a full hearing was accorded to said parties as set forth in said petition; and that this respondent filed its report as aforesaid as required by said act. That said proceeding has not been finally determined for the reasons set forth at the conclusion of its said report, and that the same is open for the relator herein to submit the verified statements, with the freight bills, to enable this respondent to issue an order for reparation. That in hearing and determining the matters before this respondent, it becomes and is the duty of this respondent to exercise its judgment and discretion in arriving at its decisions and orders in the premises; and that, as this respondent is advised, its discretion and judgment therein cannot be directed or controlled by a writ of mandamus as prayed herein. This respondent therefore denies that the petitioner, upon the showing made in said petition and in this answer, is entitled to the, or any of the relief prayed for.

This respondent denies each and every material and relevant allegation in said petition, not herein expressly admitted, which is
 12 contrary to the facts and conclusions set forth in this answer
 or in respondent's said report. And this respondent prays
 the same advantage as to each and all the matters and things
 aforesaid as this respondent would be entitled to is the same were
 specially pleaded, or set forth by way of demurrer, or motion to dismiss the petition.

And having answered said petition, this respondent prays to be hence dismissed with its reasonable costs and charges in its behalf sustained.

INTERSTATE COMMERCE COMMISSION,
 By JOSEPH W. FOLK AND
 CHAS. W. NEEDHAM, *Counsel*.

CITY OF WASHINGTON.

District of Columbia, ss:

Charles W. Needham, Assistant Counsel for the Interstate Commerce Commission, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

CHAS. W. NEEDHAM.

Subscribed and sworn to before me, George F. Graham, a notary public in and for the District of Columbia, this 12th day of June, 1914.

[SEAL.]

GEORGE F. GRAHAM,
Notary Public.

EXHIBIT A.

Interstate Commerce Commission.

No. 5356.

LOUISVILLE CEMENT COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

Submitted August 14, 1913; Decided October 7, 1913.

Reparation awarded on account of an unreasonable rate charged for the transportation of shipments of coal in carloads from North Jellico and Wilton, Ky., to Speeds, Ind., delivered at the latter point between February 1, 1907, and April 10, 1907.

Reparation denied on shipments delivered at Speeds before February 1, 1907, on the ground that the complaint was not filed with the Commission within two years from the date the cause of action accrued.

Hines & Norman for complainant.

J. M. Dewberry for Louisville & Nashville Railroad Company.

Report of the Commission.

By the COMMISSION:

Complainant is a corporation with principal office at Louisville, Ky., and is engaged in the manufacture of cement at Speeds, Ind. In its petition, filed November 15, 1911, it is alleged that defendants charged an unreasonable rate for the transportation of coal in carloads from North Jellico and Wilton, Ky., to Speeds. Reparation is asked. The shipments of coal on which reparation is asked were made during the period from July 23, 1906, to April 9, 1907.

It appears that the Louisville & Nashville established and maintained from mines on its line within what is known as Group No. 1 in the state of Kentucky a rate of \$1 per net ton on coal in carloads to Speeds for sometime prior to July 22, 1906. North Jellico and Wilton are included within the territory which is covered by Group No. 1 in the tariff. On July 22, 1906, a supplement to the Louisville & Nashville tariff became effective which named a rate of \$1.10 per ton on coal in carloads from the points of origin here involved to Speeds. The shipments of coal to Speeds from the mines

in question were billed from Woodbine, Ky. The agent at Woodbine, not having been advised of the publication of the \$1.10 rate, continued to bill the shipments at \$1, and complainant paid no more than that rate up to February 11, 1907. Shortly previous to the last-named date the agent of the Louisville & Nashville discovered that the \$1.10 rate had been published, and thereafter collected that rate on shipments made by complainant.

April 19, 1907, the complainant addressed a letter to the Commission explaining that the rate on coal from North Jellico and Wilton to Speeds had by mistake been increased 10 cents a ton, and that the increase had remained in effect from July 22, 1906, to April 10, 1907. This letter was received by the Commission April 22, 1907. In the letter the complainant asked the following:

Under the circumstances, will your honorable body authorize the Louisville & Nashville to refund this overcharge on all shipments of coal from February 1 to April 10, the date when the corrected amendment went into effect? * * * We are satisfied the L. & N. R. R. Co. would be willing to refund this overcharge provided authority is given by your honorable body.

On April 22, 1907, complainant was advised by the Commission by letter, that if the Louisville & Nashville would file with the Commission an admission that the rate from the points in question to Speeds was increased through error and ask authority to make refund, the subject would receive consideration. Complainant was also advised that if the Louisville & Nashville was not willing to submit the case in this manner it would be necessary for complainant to file formal complaint.

It appears that complainant at once took the matter up with the officials of the Louisville & Nashville upon receipt of the Commission's letter. The Louisville & Nashville refused to submit the case to the Commission until complainant had paid undercharges on shipments which had been made during the period from July 22, 1906, to February 10, 1907, amounting to \$1,335.25. The amount of reparation sought by complainant on shipments made after the

\$1.10 rate was collected was \$595.65. The result of continued
14 negotiations between complainant and the Louisville & Nashville was that February, 1911, the complainant paid the carrier \$1,335.25; and complainant now asks the Commission for an order for reparation in the sum of \$1,930.90.

The facts are admitted. The Louisville & Nashville asserts that it never intended to establish the rate of \$1.10. It further agrees that an order for reparation should be issued. We are of opinion that under the circumstances the \$1.10 rate was unreasonable to the extent it exceeded \$1. The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation in the Act:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.

The Commission holds that the date the cause of action accrues is the date of the delivery of the shipment. *Blinn Lbr. Co. v. S. P.*

Co., 18 I. C. C. 430. The filing with the Commission of a letter which gives the name of the complainant, the shipments on which reparation is asked, the points of origin and destination, and the rates on which the claim is based, is held to be sufficient to stop the running of the statute. *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 I. C. C. 170; *Youngblood v. T. & P. Ry. Co.*, 21 I. C. C. 539; *Marian Coal Co. v. D. L. & W. R. R. Co.*, 27 I. C. C. 441. The letter written by complainant and filed with the Commission April 22, 1907, referred only to shipments made by complainant from February 1, 1907, to April 10, 1907. This letter gave sufficient details with respect of the shipments made between the dates named to stop the running of the statute. No complaint was filed by complainant with reference to shipments made before February 1, 1907, until the petition here in question was filed on November 15, 1911; and these shipments had all been delivered more than four years before the filing of that petition. They are therefore barred from our consideration.

With respect to the shipments that moved after February 1, 1907, and up to April 10, 1907, a different situation is presented. Complaint was filed with the Commission with respect to these shipments within the statutory period. That the complaint was not promptly prosecuted before the Commission was due, apparently, to negotiations that were had between the complainant and the Louisville & Nashville. There is no indication in the record that complainant ever abandoned its claim for reparation with respect to the shipments which moved during the period covered by the letter filed April 22, 1907. Under these circumstances we hold that as to shipments made by complainant during the period from February 1, 1907, to April 10, 1907, the complaint was filed in time to stop the running of the statute. We further find that the rate of \$1.10 per ton paid by complainant was unreasonable to the extent that it exceeded \$1 per ton; that complainant was damaged and is entitled to reparation on all shipments made by it from the points of origin in question to Speeds between February 1, 1907, and April 10, 1907, on which it paid \$1.10. From this record, however, the amount of the reparation cannot be ascertained. The complainant should

15 prepare a statement showing as to each shipment the date of delivery of the shipment, weight, car number, and the amount of reparation asked on the basis above indicated. This statement together with the freight bills, should be presented to the defendants for verification by them. When the statement has been so prepared and verified it should be forwarded to the Commission with the freight bills, when the matter will be taken up with a view to the issuance of an order for reparation.

By the Commission :

[SEAL.]

GEORGE B. MCGINTY, *Secretary.*

Reply to Petitioner.

Filed June 26, 1914.

* * * * *

The petitioner, Louisville Cement Company, now and at all times saving and reserving to itself all, and all manner of benefit and advantage of exceptions to the many errors and insufficiency in the respondent's answer contained, for reply to so much of said answer as this petitioner is advised is material for it to reply to says:

Replying to Paragraph Five of respondent's answer this petitioner denies the allegations contained therein and petitioner says that since the answer herein was filed, the respondent, Interstate Commerce Commission at a general session held on the 8th day of June, A. D. 1914, did enter a final order in the proceedings before it pending in its docket No. 5356, and did award to respondent the reparation for the shipments over which it took jurisdiction for proof of which it has left same upon its docket and petitioner files herewith as part hereof said order marked Exhibit A.

Wherefore having fully replied petitioner prays as in its original petition herein.

LOUISVILLE CEMENT COMPANY,
By J. V. NORMAN.

EXHIBIT "A" TO REPLY.

At a General Session of the Interstate Commerce Commission held at its Office, in Washington, D. C., on the 8th day of June, A. D. 1914.

James S. Harlan, Judson C. Clements, Edgar E. Clark, Charles C. McChord, Balthasar H. Meyer, Henry C. Hall, Winthrop M. Daniels, Commissioners.

No. 5356.

LOUISVILLE CEMENT COMPANY

VS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Order Authorizing Reparation.

This case being at issue upon complaint and answer on file and having been duly heard and submitted by the parties, and
 16 full investigation of the matters and things involved having been had, and the Commission having, on October 7, 1913, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and this case now coming on to be considered in regard to the application for reparation therein, and it appearing that the

parties have filed an agreed statement respecting the movements of the shipments involved; and it further appearing from the record and said statement that there is due the complainant as reparation from the above-named defendants the sum of \$595.15, we find that complainant is entitled to an award of reparation in the above sum, with interest from April 1, 1907.

It is therefore ordered, that the above-named defendants, be, and they are hereby, authorized and required on or before August 15, 1914, to pay unto complainant, Louisville Cement Company, the sum of \$595.15, with interest thereon at the rate of 6 per cent per annum from April 1, 1907, as reparation on account of an unreasonable rate charged for the transportation of shipments of coal in earloads from North Jellico and Wilton, Ky., to Speeds, Ind., as more fully and at large appears in and by said report of the Commission and the statement filed of record.

By the Commission:

[L. S.]

GEORGE B. MCGINTY, *Secretary*.

Opinion of Court.

Filed July 20, 1914.

* * * * *

This is a suit for a mandamus to require the Interstate Commerce Commission to reverse its ruling that, under the following provision contained in Paragraph 16 of the Act approved Feb. 4, 1887, entitled "An Act to Regulate Commerce" (24 Stat. L. 379), the limitation of action begins to run from the time delivery of the shipment is made, and not from the date of payment of the freight. The provision or limitation in question reads:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after."

The ruling which is here objected to is the same as that made by the Commission in *Blinn Lumber Co. v. Southern Pacific Co. et al.*, 18 I. C. C. Rep. 430 (decided May 9, 1910), in which the subject is fully discussed and the reasons for the construction given are stated. Prior to that, the Commission was of a different opinion in the matter, and two of the members of the Commission dissented in the *Blinn Case*. However, the ruling of the Commission in the *Blinn Case* has been uniformly followed since that time, and it received the approval of the United States Commerce Court in an opinion rendered by Judge Knapp on Dec. 5, 1911, in *Arkansas Fertilizer Co. v. United States*, No. 42.

In this state of the record, this Court is asked to review and reverse, by mandamus, the ruling of the Interstate Commerce Commission which is complained of. The relator relies upon *Int. Com. Com. v. Humboldt Steamship Co.* 224 U. S. 474, which holds that mandamus will lie if the Commission, "from a misunderstanding of the law" should "absolutely refuse to act," that is,

refuse to take jurisdiction or proceed in a case at all. In this Humboldt Case, the Supreme Court of the United States clearly distinguishes between cases where a tribunal refuses to take jurisdiction, and those where it takes jurisdiction and the objection made is only as to the manner in which it is exercised. The case at bar seems to clearly belong to the latter class, and the ruling complained of involves the exercise of judgment and discretion, which, though properly reviewable on appeal or writ of error were there any provision therefor, cannot be reviewed by mandamus. Then, again, even were the ruling complained of properly reviewable by mandamus, the ruling should not be reversed unless the Court is of opinion that the ruling is clearly wrong. The Court is not of that opinion; and, therefore, the application for mandamus is denied, and the petition dismissed.

Mandamus denied and petition dismissed.

THOS. H. ANDERSON, *Justice*.

Supreme Court of the District of Columbia.

Friday, July 3rd, 1914.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * *

This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of defendant and reply to said answer and being argued and submitted to the Court it is ordered that the prayers of said petition be and they are hereby denied, the rule to show cause discharged and petition dismissed. Further it is considered that the defendant recover of petitioner *his* costs of defense to be taxed by the clerk and have execution thereof.

Supreme Court of the District of Columbia.

Friday, July 10th, 1914.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * *

Comes now the petitioner by its attorney Mr. Frank Lyon and now, in open court, notes an appeal from the judgment herein of July 3rd, 1914, whereupon, the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50) with the clerk in lieu of such bond.

Memorandum.

July 21, 1914.—\$50 deposited in lieu of bond on appeal.

Assignment of Errors.

Filed July 25, 1914.

* * * * *

Now comes petitioner, United States ex rel. Louisville Cement Company, and in connection with its appeal makes and files this, its assignment of errors, to be urged by it in the Court of Appeals on appeal.

1st. The court erred in holding that the objection here made to the action of the Interstate Commerce Commission is to the manner in which it exercised jurisdiction, because the objection was to the action of the Commission in refusing to take jurisdiction, and not to the manner in which its jurisdiction was exercised.

2nd. The court erred in holding that the Interstate Commerce Commission had taken or exercised any jurisdiction of petitioner's claim.

3rd. The court erred in holding that the ruling of the Interstate Commerce Commission complained of was the exercise of a lawful judgment or discretion.

4th. The court erred in holding that the Interstate Commerce Commission may exercise judgment or discretion in construing the law.

5th. The court erred in holding that the action of the Interstate Commerce Commission in refusing to take jurisdiction of petitioner's claim cannot be controlled or reviewed by mandamus.

6th. The court erred in holding that the action of the Interstate Commerce Commission in exercising a judgment or discretion in construing the law cannot be controlled or reviewed by mandamus.

7th. The court erred in refusing to hold that the Interstate Commerce Commission erred as a matter of law when it held that "a cause of action" to recover excessive charges accrues when a shipment is delivered.

8th. The court erred in refusing to hold that a "cause of action" to recover damages for excessive charges accrues only when the excessive charges are paid.

9th. The court erred in denying the prayer for a writ of mandamus.

10th. The court erred in holding sufficient, the response to the rule to show cause.

11th. The court erred in dismissing the petition.

J. V. NORMAN,
FRANK LYON,
Attorneys for Petitioner.

Service accepted.

CHAS. W. NEEDHAM,
Ass't Counsel Interstate Com. Comm.

Designation of Record.

Filed July 30, 1914.

* * * * *

The Clerk of the Supreme Court of the District of Columbia will please include the following papers in the transcript of record for the Court of Appeals, to wit:

1. Relator's petition, with exhibit thereto;
2. The Court's rule to show cause; with evidence of service thereof;
3. Answer of Respondent and exhibit thereto;
4. The relator's reply to said answer;
5. Opinion of Court;
6. Judgment of Court of July 3, 1914, discharging rule and dismissing petition;
7. Note of appeal in open Court and action of Court fixing appeal bond and authorizing deposit in lieu thereof;
8. Docket entry showing such deposit;
9. Assignment of errors;
10. This designation.

FRANK LYON,

*Attorney for Louisville Cement Company,
Relator and Appellant.*

Receipt of copy of this designation acknowledged this 28th day of July, 1914.

CHAS. W. NEEDHAM,

Attorney for Respondent and Appellee.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 38, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56830 at Law, wherein United States of America, ex rel. Louisville Cement Company, a corporation, is Petitioner and Interstate Commerce Commission is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 20th day of August, 1914.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*

By FRED C. O'CONNELL,

Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2737. United States of America ex rel. Louisville Cement Company, a corporation, appellant, vs. Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Aug. 21, 1914. Henry W. Hodges, clerk.

20 Wednesday, November 4th, A. D. 1914.

No. 2737.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Appellant,
vs.

INTERSTATE COMMERCE COMMISSION.

The argument in the above entitled cause was commenced by Mr. J. V. Norman, attorney for the appellant, and was continued by Mr. Charles W. Needham, attorney for the appellee, and was concluded by Mr. J. V. Norman, attorney for the appellant.

21 No. 2737.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Appellant,
v.

INTERSTATE COMMERCE COMMISSION.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is an appeal from a judgment of the Supreme Court of the District of Columbia, dismissing a petition for writ of mandamus to the Interstate Commerce Commission to compel it to take jurisdiction and proceed on a complaint filed by relator before said Commission, November 15, 1911.

In its opinion rejecting part of the claim of said petition it is correctly recited as follows:

"In its petition, filed November 15, 1911, it is alleged that defendants charged an unreasonable rate for the transportation of coal in carloads from North Jellico and Wilton, Ky., to Speeds. Reparation is asked. The shipments of coal on which reparation is asked were made during the period from July 23, 1906, to April 9, 1907.

"It appears that the Louisville & Nashville established and maintained from mines on its line within what is known as Group No. 1 in the State of Kentucky, a rate of \$1 per net ton on coal in carloads to Speeds for sometime prior to July 22, 1906. North Jellico and Wilton are included within the territory which is covered by Group No. 1 in the tariff. On July 22, 1906, a supplement to the Louisville & Nashville tariff became effective which named a rate of

\$1.10 per ton on coal in carloads from the points of origin here involved to Speeds. The shipments of coal to Speeds from the mines in question were billed from Woodbine, Ky. The agent at Woodbine, not having been advised of the publication of the \$1.10 rate, continued to bill the shipments at \$1, and complainant paid no more than that rate up to February 11, 1907. Shortly previous to the last named date the agent of the Louisville & Nashville discovered that the \$1.10 rate had been published, and there-

22 after collected that rate on shipments made by complainant.

"April 19, 1907, the complainant addressed a letter to the Commission explaining that the rate on coal from North Jellico and Wilton to Speeds had by mistake been increased 10 cents a ton, and that the increase had remained in effect from July 22, 1906, to April 10, 1907. This letter was received by the Commission April 22, 1907. In the letter the complainant asked the following:

"Under the circumstances, will your honorable body authorize the Louisville & Nashville to refund this overcharge on all shipments of coal from February 1st to April 10th, the date when the corrected amendment went into effect? * * * We are satisfied the L. & N. R. R. Co. would be willing to refund this overcharge provided authority is given by your honorable body."

"On April 22, 1907, complainant was advised by the Commission by letter, that if the Louisville & Nashville would file with the Commission and admission that the rate from the points in question to Speeds was increased through error and ask authority to make refund, the subject would receive consideration. Complainant was also advised that if the Louisville & Nashville was not willing to submit the case in this manner it would be necessary for complainant to file formal complaint.

"It appears that complainant at once took the matter up with the officials of the Louisville & Nashville upon receipt of the Commission's letter. The Louisville & Nashville refused to submit the case to the Commission until complainant had paid undercharges on shipments which had been made during the period from July 22, 1906, to February 10, 1907, amounting to \$1,335.25. The amount of reparation sought by complainant on shipments made after the \$1.10 rate was collected was \$595.65. The result of continued negotiations between complainant and the Louisville & Nashville was that in February, 1911, the complainant paid the carrier \$1,335.25; and complainant now asks the Commission for an order for reparation in the sum of \$1,930.90.

"The facts are admitted. The Louisville & Nashville asserts that it never intended to establish the rate of \$1.10. It further agrees that an order for reparation should be issued. We are of opinion that under the circumstances the \$1.10 rate was unreasonable to the extent it exceeded \$1. The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation in the act:

"All complaints for the recovery of damages shall be filed with

the Commission within two years from the time the cause of action accrues, and not after.'

"The Commission holds that the date the cause of action accrues is the date of the delivery of the shipment. *Blinn Lbr. Co. v. S. P. Co.*, 18 I. C. C., 430. The filing with the Commission of a letter which gives the name of the complainant, the shipments on which reparation is asked, the points of origin and destination, and the rates on which the claim is based is held to be sufficient to stop the running of the statute. *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 I. C. C., 170; *Youngblood v. T. & P. Ry. Co.*, 21 I. C. C., 569; *Marian Coal Co. v. D. L. & W. R. R. Co.*, 27 I. C. C., 441. The letter written by complainant and filed with the Commission April 22, 1907, referred only to shipments made by complainant from February 1, 1907, to April 10, 1907. This letter gave sufficient details with respect of the shipments made between the dates named to stop the running of the statute. No complaint was filed by complainant with reference to shipments made before February 1, 1907, until the petition here in question was filed on November 15, 1911; and these shipments had all been delivered more than four years before the filing of that petition. They are therefore barred from our consideration.

It appears from the foregoing statement that the Interstate Commerce Commission entertained the petition of the relator, awarding the payment of a part of his damages but denying the sum of \$1,-335.25 for excess charges for freight delivered from July 22, 1906, to February 10, 1907, because, in the opinion of the Commission that payment was barred by limitation which it held had begun to run from the date of the delivery of the freight instead of from the date of payment. The relator's contention is that the Interstate Commerce Commission declined to take jurisdiction of the claim for \$1,-335.25 by reason of its error in the determination of the limitation. It construes the recital that this claim is barred from consideration in the opinion to be a refusal to take jurisdiction of that part of the claim, and that it may, therefore, be compelled by mandamus to assume such jurisdiction. *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S., 474. The case cited does not govern this proceeding. In that case the Interstate Commerce Commission declined to take jurisdiction because, in its opinion, Alaska was not a territory of the United States within the meaning of the Interstate Commerce act. The court being of the opinion that Alaska was a territory within the meaning of the amended act, and that the Interstate Commerce Commission was in error in holding that it was not, ordered the writ to issue to compel it to take jurisdiction of the case, and to proceed therein as by law required.

The Interstate Commerce Commission is an administrative body with certain judicial functions. In the exercise of these functions, it is called upon to exercise judgment and discretion. It took jurisdiction of the complaint, but refused the order for the payment of part of the same because in its opinion it was barred by the limitation provided in the act. It was the duty of the Interstate Commerce

Commission to determine the question whether the claim was barred by limitation and it did so in accordance with former decisions of the same tribunal. Whether its decision is right or wrong is not the question. This court has no general supervisory power over the Interstate Commerce Commission by which to control its action upon questions within its jurisdiction. Mandamus is not the proper writ to control the judgment and discretion of an executive tribunal in the decision of a matter, the decision of which is by law imposed upon it. It cannot be made the substitute for a writ of error. *Riverside Oil Co. v. Hitchcock*, 190 U. S., 316, 325.

There may have been error in its adjudication of the question of limitation, but that error we cannot review.

The court below was right in dismissing the petition and its judgment is affirmed with costs.

Affirmed.

24

October Term, 1914.

MONDAY, December 7th, A. D. 1914.

No. 2737.

UNITED STATES OF AMERICA, ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, i. e., and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.,

December 7, 1914.

25

In the Supreme Court of the United States.

No. 2737.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Plaintiff in Error,

vs.

INTERSTATE COMMERCE COMMISSION.

Assignments of Error.

In error to the Court of Appeals of the District of Columbia.

Now comes the Plaintiff in Error, the United States of America Ex Rel., Louisville Cement Company, by J. Van Dyke Norman,

Frank Lyon and George H. Lamar, its attorneys, and says that in the record, proceedings, decision and final judgment of the Court of Appeals of the District of Columbia, in the above entitled cause, which was instituted by the plaintiff in error in the Supreme Court of the District of Columbia and brought by it to the said Court of Appeals, by appeal, there is manifest error to the prejudice of this plaintiff in error in this, to wit:

First. The said Court of Appeals erred in entering judgment affirming the judgment of the Supreme Court of the District of Columbia and, in effect sustaining the pleas to the jurisdiction of the trial court as made by the defendant in error, dismissing with costs petition of the plaintiff in error for a writ of mandamus to the said Interstate Commerce Commission to compel it to take jurisdiction and proceed on a complaint, filed by relator before said Commission November 15, 1911, based on over charges of the Louisville and Nashville Railroad Company on interstate shipments moving between July 28, 1906, and February 11, 1907, but not paid by relator until February 6, 1911.

Second. The said Court of Appeals erred in holding to be inapplicable, as authority for the relief sought, the decision of the Supreme Court of the United States in the case of Interstate Commerce Commission vs. Humboldt Steamship Company, 224 United States, 477.

26 Third. The said Court of Appeals erred in holding in effect that the preliminary consideration by said Commission incident to ascertaining facts whereon the Commission determined, as a matter of law, that it had no jurisdiction to entertain and determine on its merits the petition of relator for relief, clothed the Commission with immunity from court direction, by writ of mandamus, to entertain jurisdiction, where the relator has been deprived of access to the Interstate Commerce Commission as a special tribunal created by law for the purpose, by manifest error of law on the part of the Commission in so construing the limitation clause of Section 16 of the "Act to Regulate Commerce" as to bar its jurisdiction to adjudicate the claim for recovery of over charge on interstate shipments long before the over charges were actually paid.

Fourth. The said Court of Appeals erred in construing the "Act to Regulate Commerce" as brought in question by the defendant to the action, so as to give to the defendant in error a discretion in its construction of the jurisdiction conferred upon it by said Act.

Fifth. The said Court of Appeals erred in construing, at the instance of the defendant in said action, the "Act to Regulate Commerce" so as to make the construction by the Interstate Commerce Commission of the jurisdiction conferred upon it by said Act final and conclusive.

Sixth. The said Court of Appeals erred in so construing the "Act to Regulate Commerce" as to deprive the Court of the right to review the construction by the Interstate Commerce Commission of the limitation clause contained in Section 16 of said Act.

Seventh. The Court erred in holding that the Interstate Commerce

Commission had taken or exercised any jurisdiction of the petition of plaintiff in error within the purview of any discretionary power conferred by the "Act to Regulate Commerce."

Eighth. The said Court of Appeals erred in not holding that the trial court had jurisdiction to issue a writ of mandamus as prayed agreeably to the principal laid down by the Supreme Court of the United States in said Humboldt Steamship Company case by reason of the action of the Interstate Commerce Commission in not entertaining for adjudication on its merits said petition of plaintiff in error by reason of an erroneous construction of the limitation clause of Section 16 of said Federal Statute in effect so far as to bar from such adjudication all claims for over charge based on shipments delivered two years prior to actual payment of such over charge.

Ninth. The said Court of Appeals erred in not sustaining the jurisdiction of the trial court to issue the writ of mandamus as prayed.

Tenth. The said Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia and remanding the case with directions to issue the writ of mandamus as prayed.

J. VAN DYKE NORMAN,

FRANK LYON,

GEORGE H. LAMAR,

Attorneys for Plaintiff in Error.

I accept service of a copy of the foregoing assignments of error this 26th day of November, 1915.

CHAS. W. NEEDHAM,

Assistant Counsel Interstate

Commerce Commission.

(Endorsed:) No. 2737. United States of America ex Rel. Louisville Cement Co., a Corp., Appellant, vs. Interstate Commerce Commission. Assignments of Error. Court of Appeals, District of Columbia. Filed Nov. 26, 1915. Henry W. Hodges, Clerk.

28 In the Court of Appeals of the District of Columbia, October Term 1914.

No. 2737.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

Petition for Writ of Error.

To the Honorable, the Judges of the Court of Appeals of the District of Columbia:

Your petitioner, the United States of America ex rel. Louisville Cement Company, appellant in the above entitled case, respectfully sheweth:

1. That by its petition for a writ of mandamus, originally filed in the case in the Supreme Court of the District of Columbia on April 17, 1914, it was averred that said Court had original jurisdiction in mandamus for and in respect to the matters and things in said petition set forth, which included a cause of action growing out of the fact that said Interstate Commerce Commission had so construed the limitation clause of Section 16 of the "Act to Regulate Commerce" as to bar from its adjudication in favor of said Louisville Cement Company its otherwise admittedly valid claim for damages on account of an over charge on certain interstate shipments, moving between July 28, 1906, and February 11, 1907, paid by said Cement Company to the Louisville and Nashville Railroad Company on February 6, 1911, and for which said Louisville Cement Company filed with said Interstate Commerce Commission its petition for recovery on November 15, 1911—the construction of said limitation clause by said Commission in the premises being "that the date the cause of action accrues is the date of the delivery of the shipment."

29 2. That, by said petition for mandamus, it was prayed, among other things, that the Court issue to the respondent thereto, the Interstate Commerce Commission the peremptory writ of mandamus requiring and commanding it to take jurisdiction of petitioner's said claim as filed November 15, 1911 for damages for over charges so paid to the Louisville and Nashville Railroad Company February 8, 1911; and, on said petition for mandamus, the Supreme Court of the District of Columbia duly issued a rule on said Interstate Commerce Commission to show cause why the writ should not issue as prayed.

3. That by its answer to said petition for mandamus, filed in this case in the Supreme Court of the District of Columbia, the Interstate Commerce Commission denied the jurisdiction of the court; and in effect plead, among other things, that under the general provisions, other than Section 16, of the "Act to Regulate Commerce" as amended said Interstate Commerce Commission has power to exercise discretion in the matters and things brought before it and that the discretion extends to its construction of the provisions of said Act relating to its jurisdiction, and that said discretion cannot be controlled or reviewed by the Courts, even to the extent craved as aforesaid in the case at bar; and, by its said pleas, the Interstate Commerce Commission put in issue the jurisdiction of said trial court and, as defendant in this case, brought in question the construction of said "Act to Regulate Commerce" with the amendments thereto.

4. That said Supreme Court of the District of Columbia on final hearing, having denied the prayers, discharged the rule and dismissed the petition for mandamus and entered judgment for costs against your petitioner, an appeal was duly prosecuted and presented to this court with the result that a judgment was entered herein by this court on the 7th day of December 1914, affirming the judgment of the Supreme Court of the District of Columbia adverse to your petitioner as appellant herein and, in effect, denying the right of petitioner to a writ of mandamus against the Interstate Commerce Commission in the premises.

30 5. That your petitioner feels itself aggrieved by the said judgment of this Court on its appeal, so rendered on the 7th day of December, 1914, and does hereby file and present to this Court its petition for the allowance of a writ of error looking to a review of said judgment of this Court by the Supreme Court of the United States, agreeably to the Statutes in such cases made and provided, including section 250 of the Judicial Code, approved March 3, 1911, and especially the first, fifth and sixth clauses of said section; and your petitioner invites the attention of the Court to its assignment of errors as presented and filed herewith.

Wherefore your petitioner prays for an order allowing said writ of error and that a transcript of the record and proceedings upon which said judgment was rendered, duly authenticated, may be sent to the Supreme Court of the United States as prescribed by law; and that such other and further proceedings may be had in the premises as may be just and proper.

J. VAN DYKE NORMAN,
FRANK LYON,
GEORGE H. LAMAR,
Attorneys for Petitioner.

(Endorsed:) No. 2737. United States of America ex rel. Louisville Cement Company, a Corp., Appellant, vs. Interstate Commerce Commission. Petition for Writ of Error. Court of Appeals, District of Columbia. Filed Nov. 26, 1915. Henry W. Hodges, Clerk.

31 Saturday, November 27th, A. D. 1915.

No. 2737.

UNITED STATES OF AMERICA ex Rel. LOUISVILLE CEMENT COMPANY,
a Corporation, Appellant,
vs,
INTERSTATE COMMERCE COMMISSION.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is by the Court this day ordered that said writ issue as prayed; and the bond for costs is fixed at the sum of three hundred dollars.

32 UNITED STATES OF AMERICA, 88:

The President of the United States, to the Honorable the Justices of
the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between United States of America, ex rel. Louisville Cement Company, a Corporation, appellant, and Interstate Commerce Commission a manifest error hath happened, to the great dam-

age of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,

Clerk of the Court of Appeals of the District of Columbia.

Allowed by _____.

33

(Bond on Writ of Error.)

Know all men by these presents, that we, The Louisville Cement Company, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the Interstate Commerce Commission in the full and just sum of Three Hundred (\$300) Dollars to be paid to the said Interstate Commerce Commission, its certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 1st day of December, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between United States of America et rel., Louisville Cement Company, a corporation, as appellant, and the Interstate Commerce Commission, as appellee a judgment was rendered against the said United States of America ex rel., Louisville Cement Company, a corporation and the said United States of America ex rel., Louisville Cement Company, a corporation having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Interstate Commerce Commission citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said United States of America ex rel. Louisville Cement Company,

a corporation shall prosecute said writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUISVILLE CEMENT CO., [SEAL.]

By HENRY S. GRAY,

Sec'y & Treas. [SEAL.]

AMERICAN SURETY COMPANY OF
NEW YORK, [SEAL.]

By CLAUDE B. BROWN,

Resident Vice-President. [SEAL.]

Attest:

[Seal of American Surety Co.]

PAUL N. CHERRY,

Resident Assistant Secretary. [SEAL.]

Scaled and delivered in the presence of
J. V. NORMAN.

Approved by

SETH SHEPARD,

*Chief Justice Court of Appeals
of the District of Columbia.*

33½ [Endorsed:] No. 2737. United States of America ex rel.
Louisville Cement Company, a Corporation, Appellant, vs.
Interstate Commerce Commission. Bond for costs on Writ of Error
to Supreme Court, U. S. Court of Appeals, District of Columbia.
Filed Dec. 3, 1915. Henry W. Hodges, Clerk.

34 UNITED STATES OF AMERICA, ss:

To Interstate Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein United States of America ex rel. Louisville Cement Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 3rd day of December, in the year of our Lord one thousand nine hundred and fifteen.

SETH SHEPARD,

*Chief Justice of the Court of Appeals
of the District of Columbia.*

Service acknowledged Dec. 3rd, 1915.

CHAS. W. NEEDHAM,

Counsel for Interstate Commerce Commission.

35 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages numbered from 1 to 34 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of United States of America ex rel. Louisville Cement Company, a corporation, vs. Interstate Commerce Commission. No. 2737, October Term, 1915, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe by name and affix the seal of said Court of Appeals, at the City of Washington, this 3rd day of December A. D. 1915.

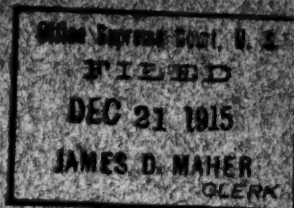
[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,

*Clerk of the Court of Appeals of the
District of Columbia.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 12/14/15. H. W. H., Clerk.]

Endorsed on cover: File No. 25,057. District of Columbia Court of Appeals. Term No. 326. The United States ex rel. Louisville Cement Company, plaintiff in error, vs. Interstate Commerce Commission. Filed December 21st, 1915. File No. 25,057.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

No. [REDACTED] 3 [REDACTED] 70

UNITED STATES OF AMERICA EX REL. LOUISVILLE
CEMENT COMPANY, A CORPORATION, PLAINTIFF IN
ERROR,

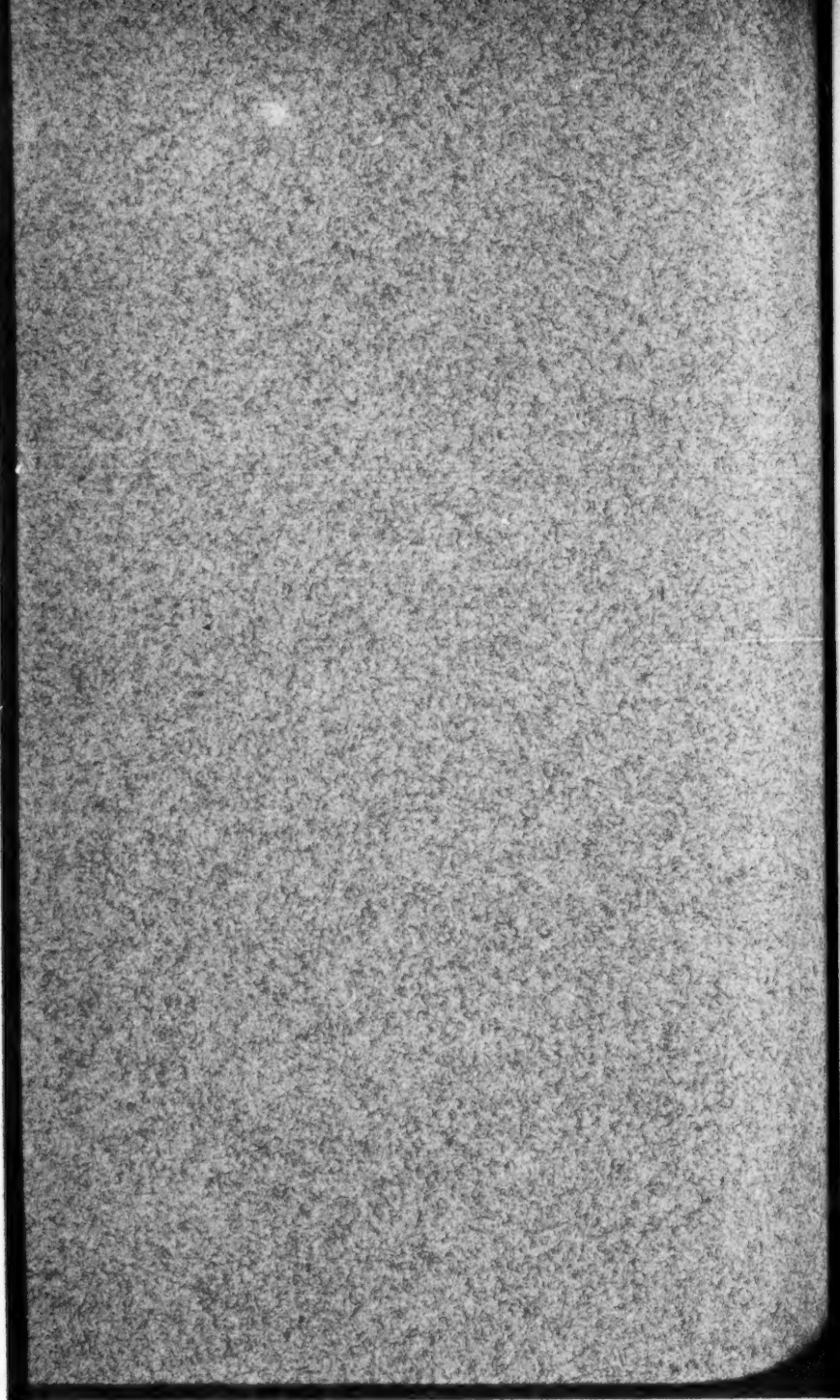
vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT
IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA.

MOTION TO ADVANCE.

J. VAN DYKE NORMAN,
FRANK LYON,
GEORGE H. LAMAR,
Attorneys for Plaintiff in Error.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 774.

UNITED STATES OF AMERICA EX REL. LOUISVILLE
CEMENT COMPANY, A CORPORATION, PLAINTIFF IN
ERROR,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT
IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA.

MOTION TO ADVANCE.

Comes now the plaintiff in error in the above-entitled cause, by its counsel, and respectfully moves this honorable court to advance this cause for hearing at such time as the court may specify.

Statement of Matter Involved.

The case is presented upon writ of error to the Court of Appeals of the District of Columbia, under the first, fifth, and sixth clauses of section 250 of the Judicial Code, by

reason of the affirmance by that court of the action of the Supreme Court of the District of Columbia in sustaining the plea of the defendant in error to the jurisdiction of the trial court and dismissing, with costs, the petition of the plaintiff in error for a writ of mandamus against the defendant in error to compel it to take jurisdiction of, and hear and determine on its merits, the petition of plaintiff in error, filed with the defendant in error on November 15, 1911, for damages for overcharges paid to the Louisville and Nashville Railroad Company, February 8, 1911, on account of interstate shipments moving between July 28, 1906, and February 11, 1907, notwithstanding the fact that the defendant in error had so construed the limitation clause of section 16 of the "Act to Regulate Commerce" as to bar its jurisdiction to entertain such petition on its merits before the payment was actually made by plaintiff in error on which the claim is based, to wit, at the expiration of two years from date of *delivery* of shipment.

There is pointed out in the assignment of errors, among other things, errors on the part of the court below, (1) in sustaining the plea to the jurisdiction of the court of first instance; (2) in holding as inapplicable, as authority for the relief sought, the decision of this court in the case of *Interstate Commerce Commission vs. Humboldt Steamship Company*, 224 U. S., 477; (3) in holding that the preliminary consideration by the Commission incident to ascertaining facts whereon to determine, as a matter of law, that it had no jurisdiction to entertain the petition and adjudicate the claim for relief on its merits, constituted such an exercise of jurisdiction on the part of the Interstate Commerce Commission as to clothe it with immunity from court direction by mandamus to entertain jurisdiction on the merits, where the relator is being deprived of access to this special tribunal created by law for the purpose by manifest error of law on the part of the defendant in error in so construing said limitation clause as to bar its jurisdiction to adjudicate the

claim for recovery of overcharges on interstate shipments before the overcharges were actually paid; and (4) in so construing the "Act to Regulate Commerce" as to give to the defendant in error a discretion in its construction of the jurisdiction conferred upon it by said act, also so as to make the construction by the Interstate Commerce Commission of its jurisdiction final and conclusive, and also so as to deprive the court of the right to review the construction by the Interstate Commerce Commission of the limitation clause contained in section 16 of said act.

Reasons for Application.

The reasons for granting this motion to advance include the following, to wit:

1. Because the decision complained of so restricts the application of the doctrine laid down by this court in the case of Interstate Commerce Commission *vs.* Humboldt Steamship Company, 224 U. S., 477, as to render early review of great importance.

2. Because, pending such review, all interstate shippers are being deprived of access to the tribunal created by Congress to hear and determine on their merits claims for repayment of overcharges, to the extent that such overcharges may not be paid until two years after delivery.

3. Because this is a *quasi* test case of far-reaching importance, especially to the interstate shippers throughout the United States, and presents a matter of general public interest.

Wherefore the plaintiff in error prays that the motion to advance be granted.

J. VAN DYKE NORMAN,
FRANK LYON,
GEORGE H. LAMAR,
Attorneys for Plaintiff in Error.

Notice to Counsel.

To Hon. JOSEPH W. FOLK and

CHARLES W. NEEDHAM,

Attorneys for Defendant in Error:

You will please take notice that we are about to file in the court and cause aforesaid the foregoing motion to advance the writ of error therein, and that on Monday, the third day of January, 1916, we will submit said motion to the said court, together with the foregoing statement of matter involved and reasons therefor.

J. VAN DYKE NORMAN,

FRANK LYON,

GEORGE H. LAMAR,

Attorneys for Plaintiff in Error.

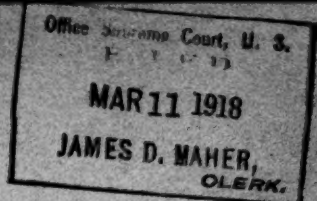
The undersigned, counsel for defendant in error in the foregoing cause, hereby acknowledge service of the above motion, including statement and reasons for application and notice of date of submission.

Dated at Washington, D. C., this 20th day of December, A. D. 1915.

JOS. W. FOLK,

CHAS. W. NEEDHAM,

Counsel for Defendant in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 326 70

UNITED STATES OF AMERICA *EX REL.* LOUIS-
VILLE CEMENT COMPANY, A CORPORATION, PLAIN-
TIF IN ERROR,

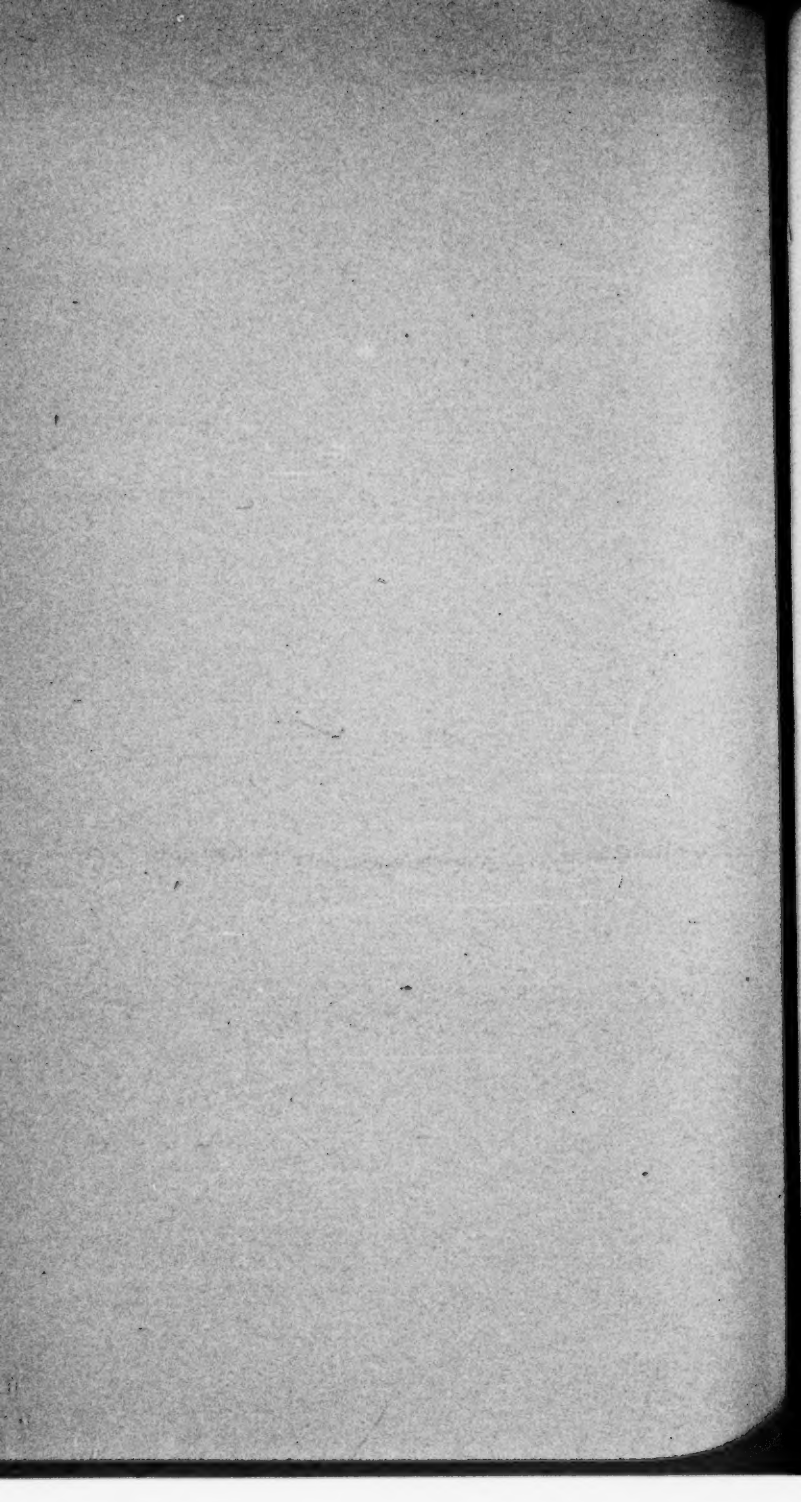
v. s.

INTERSTATE COMMERCE COMMISSION, DEFENDANT
IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

J. VAN DYKE NORMAN,
JOHN S. KELLEY, JR.,
GEORGE H. LAMAR,
Counsel for Plaintiff in Error.



INDEX.

	Page
Statement of the Case.....	1-10
Assignment of Errors.....	8-10
Argument	10-50
Essence of Case.....	10-12
I. Jurisdiction of this Court.....	12-22
Jurisdiction of Trial Court in Issue.....	13
Construction of Federal Statute Drawn in Question...	13-17
Validity of Authority Drawn in Question.....	17-22
II. Limitation Clause Misconstrued.....	23-34
Alleged Bar of Claim.....	23-32
This Court's Construction to Contrary.....	32-34
III. Jurisdiction of Trial Court.....	34-50
Effect of Commission's Error of Law.....	34-37
Mandamus Proper Remedy.....	37-38
Error of Commission Not Committed in the Exercise of a Lawful Judgment or discretion.....	38-48
Citation of Court of Appeals Inapplicable.....	48-50

AUTHORITIES.

Blinn Lumber Co. <i>vs.</i> S. P. Co., 18 I. C. C., 430.....	14, 23, 24-26, 37, 42
Code D. C., Sec. 250.....	1, 13, 16, 22
Cook Co. <i>vs.</i> C. & D. Co., 138 U. S., 635.....	18
Finn <i>vs.</i> U. S., 123 U. S., 231.....	35
Ford <i>vs.</i> U. S., 116 U. S., 213.....	31
Garfield <i>vs.</i> U. S. <i>ex Rel.</i> Goldsby, 211 U. S., 249.....	41
I. C. C. <i>vs.</i> Humboldt S. Co., 224 U. S., 477... 8, 11, 18, 20, 37, 40, 48, 50	43
I. C. C. <i>vs.</i> C., N. O. & T. P. Ry. Co., 167 U. S., 479.....	44
Kendall <i>vs.</i> U. S., 12 Pet., 524.....	23
Kite & M. Co. <i>vs.</i> Deepwater Ry. Co., 15 I. C. C., 235.....	38
Knox Co. <i>vs.</i> Aspinwall, 24 How., 376.....	30
Lehigh Valley R. Co. <i>vs.</i> Meeker, 211 Fed., 785.....	46
Magnetic Healing <i>vs.</i> McAnnulty, 187 U. S., 94.....	38
Marbury <i>vs.</i> Mason, 1 Cranch, 163.....	30
M. C. & C. Co. <i>vs.</i> Pa. R. R. Co., 230 U. S., 247.....	23
M. & M. Grain Co. <i>vs.</i> St. L. & L. Y. R. R. Co., 16 I. C. C., 385...	18
McLean <i>vs.</i> D. & R. G. R. R. Co., 203 U. S., 38.....	15
Muse <i>vs.</i> Arlington Hotel Co., 168 U. S., 429.....	

Lane v. Hogland, 244 U.S. 174.

	Page
Newman <i>vs.</i> U. S. <i>ex Rel.</i> Frizzell, 238 U. S., 537.....	13
Nutt <i>vs.</i> Knut, 200 U. S., 12.....	17
Pa. R. R. Co. <i>vs.</i> Int. Coal Co., 230 U. S., 184.....	30
Pettit <i>vs.</i> Walshe, 194 U. S., 205.....	16
Phillips Co. <i>vs.</i> Gr. T. W. Ry. Co., 236 U. S., 662.....	22
Pickering <i>vs.</i> Lomax, 145 U. S., 310.....	21
Pleasant Hill Lbr. Co. <i>vs.</i> St. L. & L. W. Ry. Co., 15 I. C. C., 532.....	23
Riverside Oil Co. <i>vs.</i> Hitchcock, 190 U. S., 316.....	7, 40
Roberts <i>vs.</i> U. S., 176 U. S., 211, 231.....	43
Sage <i>vs.</i> Hampe, 235 U. S., 99.....	17
Texas & Pac. R. Co. <i>vs.</i> Abilene C. O. Co., 204 U. S., 406.....	30
U. S. <i>vs.</i> Hocking Valley Ry. Co., 194 Fed., 234.....	29
U. S. <i>vs.</i> Lippitt, 100 U. S., 668.....	36
U. S. <i>vs.</i> Lynch, 137 U. S., 280.....	18, 20
U. S. <i>vs.</i> Warfield, 172 U. S., 52.....	35
U. S. <i>ex Rel.</i> Lewis <i>vs.</i> Boutwell, 17 Wall., 604.....	38
U. S. <i>ex Rel.</i> S. C. <i>vs.</i> Seymour, 153 U. S., 353.....	18
U. S. <i>ex Rel.</i> Steinmetz <i>vs.</i> Allen, 192 U. S., 543.....	18, 38
U. S. <i>ex Rel.</i> Taylor <i>vs.</i> Taft, 203 U. S., 461.....	18
Watts <i>vs.</i> U. S., 123 Fed., 114.....	36
West <i>vs.</i> Hitchcock, 19 App. D. C., 333.....	47
W. A. Mt. B. Ry. Co. <i>vs.</i> Downey, 236 U. S., 90.....	13

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1916.

No. 326.

UNITED STATES OF AMERICA *EX REL.* LOUIS-
VILLE CEMENT COMPANY, A CORPORATION, PLAIN-
TIF IN ERROR,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT
IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The case is presented on writ of error to the Court of Appeals of the District of Columbia, on a petition (R., 26-28) allowed by that court (R., 28), based upon section 250 of the Code of the District of Columbia, and especially the

first, fifth, and sixth clauses thereof, conferring appellate jurisdiction on this court.

The final judgment (R., 24) on which the writ is based was entered December 7, 1914, and consisted of an affirmance, with costs, of the judgment (R., 18) of the Supreme Court of the District of Columbia of July 3, 1914, dismissing the petition (R., 2-11) of plaintiff in error for a writ of mandamus against the defendant in error to compel it to take jurisdiction of, and hear and determine on its merits, the petition of the plaintiff in error for damages for overcharges on account of interstate shipments moving between July 28, 1906, and February 11, 1907, *paid* to the Louisville & Nashville Railroad Company, *February 8, 1911, about nine months prior to the filing of the petition*, to wit, *November 15, 1911*; notwithstanding the fact that the defendant in error had so construed the limitation clause of section 16 of the "Act to Regulate Commerce" as to bar, *even before the payment sought to be recovered had actually been made*, any jurisdiction on the part of the Commission to entertain such petition on its merits, the construction being "that the date the cause of action accrues is the date of the delivery of the shipment."

The facts involved in the proceeding before the Commission are aptly stated in the report of the Commission constituting Exhibit A to the answer of the plaintiff in error as filed in the court of first instance (R., 13-15) and from which we quote as follows:

"Complainant is a corporation with principal office at Louisville, Ky., and is engaged in the manufacture of cement at Speeds, Ind. In its petition, filed November 15, 1911, it is alleged that defendants charged an unreasonable rate for the transportation of coal in earloads from North Jellico and Wilton, Ky., to Speeds. Reparation is asked. The shipments of coal on which reparation is asked were made during the period from July 23, 1906, to April 9, 1907.

"It appears that the Louisville & Nashville estab-

lished and maintained from mines on its line within what is known as Group 1 in the State of Kentucky a rate of \$1 per net ton on coal in carloads to Speeds for some time prior to July 22, 1906. North Jellico and Wilton are included within the territory which is covered by Group No. 1 in the tariff. On July 22, 1906, a supplement to the Louisville & Nashville tariff became effective which named a rate of \$1.10 per ton on coal in carloads from the points of origin here involved to Speeds. The shipments of coal to Speeds from the mines in question were billed from Woodbine, Ky. The agent at Woodbine, not having been advised of the publication of the \$1.10 rate continued to bill the shipments at \$1, and complainant paid no more than that rate up to February 11, 1907. Shortly previous to the last-named date the agent of the Louisville & Nashville discovered that the \$1.10 rate had been published, and thereafter collected that rate on shipments made by complainant.

"April 19, 1907, the complainant addressed a letter to the Commission explaining that the rate on coal from North Jellico and Wilton to Speeds had by mistake been increased 10 cents a ton, and that the increase had remained in effect from July 22, 1906, to April 10, 1907. In the letter the complainant asked the following:

"Under the circumstances, will your honorable body authorize the Louisville & Nashville to refund this overcharge on all shipments of coal from February 1 to April 10, the date when the corrected amendment went into effect? * * * We are satisfied the L. & N. R. Co. would be willing to refund this overcharge provided authority is given by your honorable body.

"On April 22, 1907, complainant was advised by the Commission by letter, that if the Louisville & Nashville would file with the Commission an admission that the rate from the points in question to Speeds was increased through error and ask authority to make refund, the subject would receive consideration. Complainant was also advised that if the Louisville & Nashville was not willing to submit the case in this manner it would be necessary for complainant to file formal complaint.

"It appears that complainant at once took the matter up with the officials of the Louisville & Nashville upon receipt of the Commission's letter. The Louisville & Nashville refused to submit the case to the Commission until complainant had paid undercharges on shipments which had been made during the period from July 22, 1906, to February 10, 1907, amounting to \$1,335.25. The amount of reparation sought by complainant on shipments made after the \$1.10 rate was collected was \$595.65. The result of continued negotiations between complainant and the Louisville & Nashville was that *February, 1911*, the complainant *paid the carrier \$1,335.25*; and complainant now (9 months after payment) asks the Commission for an order for reparation in the sum of \$1,930.90.

"The facts are admitted. The Louisville & Nashville asserts that it never intended to establish the rate of \$1.10. It further agrees that an order of reparation should be issued. We are of opinion that, under the circumstances, the \$1.10 was unreasonable to the extent it exceeded \$1. The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation in the act:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

"The Commission holds that the date the cause of action accrues is the date of the delivery of the shipment. *Blinn Lbr. Co. vs. S. P. Co.*, 18 I. C. C., 430. The filing with the Commission of a letter which gives the name of the complainant, the shipments on which reparation is asked, the points of origin and destination, and the rates on which the claim is based, is held to be sufficient to stop the running of the statute. *Woodward & Dickerson vs. L. & N. R. Co.*, 15 I. C. C., 170; *Younghood vs. T. & P. Ry. Co.*, 21 I. C. C., 569; *Marian Coal Co. vs. D., L. & W. R. R. Co.*, 27 I. C. C., 441. The letter written by complainant and filed with the Commission April 22, 1907, referred only to shipments made by complainant from February 1, 1907, to April 10, 1907. This

letter gave sufficient details with respect of the shipments made between the dates named to stop the running of the statute. No complaint was filed by complainant with reference to shipments made before February 1, 1907, until the petition here in question was filed on November 15, 1911; and these shipments had all been delivered more than four years before the filing of that petition. *They are, therefore, barred from our consideration.*" (Italics and parentheses supplied.)

The balance of the report shows that the claim for \$595.65 was *alone* entertained, and this only was allowed because the same was paid and right to refund claimed in the form of the letter of April 19, 1907, before the expiration of two years from the date of shipments.

As to the claim in this action involved, based on overcharges on shipments made from July 22, 1906, to February 11, 1907, on which payment was made February 8, 1911, the defendant in error adhered to its position that the same was "barred from our (its) consideration"; although the cement company, agreeably to the Act to Regulate Commerce, duly filed its petition for rehearing, the same being overruled.

Thereupon the cement company having no remedy by appeal or review, filed this action in the Supreme Court of the District of Columbia in the form of the petition (R., 2-10) for mandamus on the ground that the defendant in error had refused to take jurisdiction because of a misunderstanding by it of the law.

Upon this petition the court issued a rule (R., 10-11) on the defendant in error as defendant in the action to show cause why the writ of mandamus should not issue.

By its answer (R., 11-15) the defendant in error denied the jurisdiction of this court of first instance to issue the writ of mandamus, asserted a construction of the act of Congress to Regulate Commerce as amended in support of its contention adverse to such jurisdiction on the part of the court,

denied that it had committed any errors of law in the premises and affirmatively averred that in its ruling (to the effect that the claim was "barred" from its "consideration"), it had exercised its lawful judgment and discretion, which judgment and discretion, it alleged, cannot be directed or controlled by mandamus.

By its answer and having more particular reference to the claim for \$595.65, which was entertained as above stated, the defendant in error alleged that the proceeding before it had not been fully disposed of because the same had been left open for the cement company to submit verified statements with the freight bills, to enable the defendant in error to issue its order of reparation with respect thereto.

To this answer the plaintiff in error presented a reply (R., 16), which was not controverted, in which it was alleged that subsequent to the filing of the answer the proceedings before the defendant in error had been finally disposed of, even as to the particular shipments over which the defendant in error entertained jurisdiction, as to which it had entered a certain order thereto exhibited (R., 16-17). This gave damages to the extent of said claim for \$595.65, as originally claimed by the cement company in its letter of April 19, 1907, but not including the claim for damages arising upon the overpayment made February 8, 1911, theretofore held by the defendant in error to have been "*barred from our consideration.*"

Thereafter the cause was duly presented to the court of first instance on the petition for the writ of mandamus and the sufficiency of the response to the rule, which resulted in a written opinion (R., 17-18) being rendered adverse to the plaintiff in error.

By reference to this opinion it will be observed that the Supreme Court of the District of Columbia disposed of the case on the theory that the defendant in error took jurisdiction of the claim in question, and that the objection urged simply goes to the manner in which the jurisdiction was exer-

cised, and sustained the plea to the jurisdiction of the Supreme Court of the District of Columbia.

Agreeably to this opinion, judgment was entered by that court dismissing the petition, with costs in favor of the defendant in error.

From this an appeal to the Court of Appeals of the District of Columbia was duly prosecuted, with the result above stated.

In its opinion, on which the judgment of affirmance of the court of first instance was entered, the Court of Appeals (R., 23-24) holds that:

"The Interstate Commerce Commission is an administrative body with certain judicial functions. In the exercise of these functions, it is called upon to exercise judgment and discretion. It took jurisdiction of the complaint, but refused the order for the payment of part of the same because in its opinion it was barred by the limitation provided in the act. It was the duty of the Interstate Commerce Commission to determine the question whether the claim was barred by limitation and it did so in accordance with former decisions of the same tribunal. Whether its decision is right or wrong is not the question. This court has no general supervisory power over the Interstate Commerce Commission by which to control its action upon questions within its jurisdiction. Mandamus is not the proper writ to control the judgment and discretion of an executive tribunal in the decision of a matter, the decision of which is by law imposed upon it. It cannot be made the substitute for a writ of error. *Riverside Oil Co. vs. Hitchcock*, 190 U. S., 316, 325.

"There may have been error in its adjudication of the question of limitation, but that error we cannot review.

"The court below was right in dismissing the petition and its judgment is affirmed with costs."

The case was thereupon brought to this court upon writ of error, duly allowed by the court below and in which court an assignment of errors was duly filed (R., 24-26).

Assignment of Errors.

First. The said Court of Appeals erred in entering judgment affirming the judgment of the Supreme Court of the District of Columbia and in effect sustaining the pleas to the jurisdiction of the trial court as made by the defendant in error, dismissing with costs petition of the plaintiff in error for a writ of mandamus to the said Interstate Commerce Commission to compel it to take jurisdiction and proceed on a complaint, filed by relator before said Commission November 15, 1911, based on overcharges of the Louisville and Nashville Railroad Company on interstate shipments moving between July 28, 1906, and February 11, 1907, but not paid by relator until February 6, 1911.

Second. The said Court of Appeals erred in holding to be inapplicable, as authority for the relief sought, the decision of the Supreme Court of the United States in the case of Interstate Commerce Commission *vs.* Humboldt Steamship Company, 224 United States, 477.

Third. The said Court of Appeals erred in holding in effect that the preliminary consideration by said Commission incident to ascertaining facts whereon the Commission determined, as a matter of law, that it had no jurisdiction to entertain and determine on its merits the petition of relator for relief, clothed the Commission with immunity from court direction, by writ of mandamus, to entertain jurisdiction, where the relator has been deprived of access to the Interstate Commerce Commission as a special tribunal created by law for the purpose, by manifest error of law on the part of the Commission in so construing the limitation clause of section 16 of the "Act to Regulate Commerce" as to bar its jurisdiction to adjudicate the claim for recovery of overcharge on interstate shipments long before the overcharges were actually paid.

Fourth. The said Court of Appeals erred in construing the "Act to Regulate Commerce" as brought in question by the defendant to the action, so as to give to the defendant in error a discretion in its construction of the jurisdiction conferred upon it by said act.

Fifth. The said Court of Appeals erred in construing, at the instance of the defendant in said action, the "Act to Regulate Commerce" so as to give defendant exclusive jurisdiction in the premises and to make the construction by the Interstate Commerce Commission of the jurisdiction conferred upon it by said act exclusive, final and conclusive.

Sixth. The said Court of Appeals erred in so construing the "Act to Regulate Commerce" as to deprive the court of the right to review the construction by the Interstate Commerce Commission of the limitation clause contained in section 16 of said act.

Seventh. The court erred in holding that the Interstate Commerce Commission had taken or exercised any jurisdiction of the petition of plaintiff in error within the purview of any discretionary power conferred by the "Act to Regulate Commerce."

Eighth. The said Court of Appeals erred in not holding that the trial court had jurisdiction to issue a writ of mandamus as prayed agreeably to the principle laid down by the Supreme Court of the United States in said Humboldt Steamship Company case by reason of the action of the Interstate Commerce Commission in not entertaining for adjudication on its merits said petition of plaintiff in error by reason of an erroneous construction of the limitation clause of section 16 of said Federal statute in effect so far as to bar from such adjudication all claims for overcharge based on shipments delivered two years prior to actual payment of such overcharge.

Ninth. The said Court of Appeals erred in not sustaining the jurisdiction of the trial court to issue the writ of mandamus as prayed.

Tenth. The said Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia and remanding the case with directions to issue the writ of mandamus as prayed.

ARGUMENT.

After disposing of the preliminary question of jurisdiction of this court, the foregoing assignments of error will be presented under two main subdivisions of the argument; the first in order going to the basic error of the Commission in its construction of the limitation clause of the Act to Regulate Commerce, by which it reached the conclusion that the claim here involved was "barred from our (its) consideration," and the balance of the brief to relate more particularly to those points bearing upon the question of jurisdiction of the trial court over the subject-matter of the action.

Essence of Case.

As preliminary to such arguments, the indulgence of the court is craved for a brief recapitulation of what, in essence, this case is.

The Cement Company, by its petition to the Interstate Commerce Commission, presented for adjudication on their merits three propositions, as to each of which the basic facts were undisputed, namely, to wit:

(a) That the Louisville & Nashville Railroad Company charged an unreasonable rate for the interstate transportation of coal in carloads between certain points, the averment being made that the rate had been increased by ten cents a ton by inadvertence or mistake, and remained in effect from July 22, 1906, to April 10, 1907;

(b) That, by reason of this excess charge, the Cement Company was entitled to reparation to the extent of \$595.65 for certain shipments, the freight on which was paid for in full substantially at the time of shipment, and within two years of which the matter was brought to the attention of the Commission by letter of April 19, 1907;

(c) *That, by reason of such excess charge, the Cement Company was entitled to an order for reparation to the extent of \$1,335.25 for certain other shipments made within this period and on which payment of overcharge was not made until February 8, 1911, about nine months prior to the filing of the petition.*

The Commission considered, and decided on their merits, propositions (a) and (b), on each of which an affirmative order was issued in favor of the Cement Company.

As to the subject-matter of proposition (c), the Commission distinctly held that it had no jurisdiction, but that, by operation of law, the claim was "*barred from our (its) consideration.*" the Commission holding that the "*action accrues*" within the meaning of the statute of limitation when the shipment was delivered and not when the freight was collected; and thus failed and refused to issue any affirmative order on the merits thereof, as we think, upon a mistake in its conception of the law bearing upon its jurisdiction to entertain the claim on its merits.

There being no other remedy, relief was sought by way of mandamus, as was done and sustained by this court in the case of *Interstate Commerce Commission vs. Humboldt Steamship Company*, 224 U. S., 477, the Commission being made party defendant to the action.

Denying its own jurisdiction over the subject-matter of proposition (c) when presented to it by petition, the Commission in this action in court asserted in effect that its jurisdiction over the subject-matter was *exclusive*, and denied the jurisdiction of the court, as an incident to the exercise of the writ of mandamus in the action to compel the Commission to take jurisdiction of the subject-matter, to correct any error the Commission may have made in so construing the act of Congress as to bar its own jurisdiction over the subject-matter of proposition (c).

The action of the court below, now sought to be reversed on writ of error, sustained the contention of the Commission,

while expressly holding that "there may have been error" of law on the part of the Commission in so construing "the question of limitation" as to bar the matter from its "consideration."

I.

Jurisdiction of This Court.

It is not anticipated that the defendant in error will dispute the jurisdiction of this court, under the statute, to review the judgment of the Court of Appeals on writ of error. The Court of Appeals did not deny such jurisdiction on the part of this court. On the contrary, the petition (R., 26-28) for the writ was allowed (R., 28) by the court below. For the convenience of this court, however, the question of jurisdiction will be discussed as if denied.

The plaintiff in error bases its right to a writ of error upon section 250, subsections 1, 5, and 6, Judicial Code, which provides:

"SECTION 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error, or appeal in the following cases:

"1. In cases in which the jurisdiction of the trial court is in issue, but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision. * * *

"5. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

"6. In cases in which the construction of any law of the United States is drawn in question by the defendant."

Jurisdiction of Trial Court in Issue.

By paragraph 1 of the petition for mandamus filed in the Supreme Court of the District of Columbia (R., 1-2), it was said that said trial court "had original jurisdiction" in the premises.

By paragraph 1 of the answer thereto of the Interstate Commerce Commission (R., 10), the defendant denied the averment, and there was placed in issue the question of the jurisdiction of the trial court in the trial court itself. One of the effects of the decision of the trial court was adverse to its own jurisdiction; and this was sustained on appeal by the Court of Appeals.

It seems clear, therefore, without the necessity of citation of authorities, that the Supreme Court of the United States has appellate jurisdiction upon the first clause of section 250 of the Judicial Code.

Construction of Federal Statute Drawn in Question.

The sixth clause of section 250 of the Judicial Code authorizes a writ of error to the Court of Appeals of the District of Columbia for review in this court of cases in which "the construction of a law of the United States is drawn in question by the defendant."

This, according to the construction of the statute, has reference to acts of Congress of general application, as contradistinguished from a special law, limited in its scope and operation to the District of Columbia.

W. A. Mt. B. Railway Company *vs.* Downey, 236 U. S., 90.

Newman *vs.* U. S. *ex Rel.* Frizzell, 238 U. S., 537.

In the case at bar defendant drew in question the construction of the Act to Regulate Commerce, with the amend-

ments thereto, laws of the United States of undoubted general application.

In essence the petition for mandamus asserted the right of the relator to have the defendant in error consider on its merits a certain claim for refund, which had been presented to the Commission by petition and which the defendant in error had refused to consider on its merits, on the ground that it had been barred from its consideration, although the commonly accepted language of the limitation clause of the statute was admittedly adverse to the position taken by the Commission in denying its own jurisdiction over the claim.

In its answer the defendant in error, as defendant in the action, in effect relied, first, upon its own construction of the Act to Regulate Commerce as amended, more particularly set forth in its decision in the case of *Blinn Lumber Company vs. S. P. Company*, 18 I. C. C., 430, as referred to in the report of the Commission constituting Exhibit A to its answer, which report is referred to and made a part of the answer, and in which said decision the defendant in error asserts its right to disregard the generally accepted construction of the language used in the limitation clause of section 16 of the act, and draws such generally accepted construction in question by asserting a basic purpose of Congress to the contrary alleged by defendant to be gathered from the entire Act to Regulate Commerce and the acts constituting the various amendments thereto.

Independently of the correctness or error of the Commission with regard to the construction of the statute bearing upon the question of limitation, the defendant in error, as defendant in the action, by its answer, directly drew in question the construction of the statute in support of an assertion of its immunity from the writ of mandamus and the exclusion by the statutes of any jurisdiction on the part of the trial court to require it to proceed agreeably to law as construed by the court.

By paragraph V of the answer (R., 12) the defendant averred—

“that the matters and things heard and determined by this respondent in the said proceeding before it, No. 5356, were and are matters and things *within its jurisdiction and power to determine under and by virtue of the act of Congress entitled ‘An Act to Regulate Commerce’ as amended.* * * * That in hearing and determining the matters before this respondent, it became and is the duty of this respondent to exercise its judgment and discretion in arriving at its decision and orders in the premises; and that, as this respondent is advised, its discretion and judgment therein cannot be directed or controlled by a writ of mandamus as prayed herein.” (Italics supplied.)

It would seem to be unnecessary to cite authority in support of our contention that the defendant in error drew in question the construction of a law of the United States within the meaning of the sixth clause of section 250 of the Judicial Code, giving plaintiff in error a right to review the final judgment of the Court of Appeals by writ of error.

For the convenience of the court, however, we will briefly refer to several decisions of this honorable court.

In the case of *Muse vs. Arlington Hotel Company*, 168 U. S., 429, the jurisdiction of this court of a case from a Circuit Court of Appeals was involved. At that time, writs of error could be sued out directly from the Supreme Court to the Circuit Court in cases in which the construction or application of the Constitution of the United States was involved or in which the validity or construction of any treaty made under the authority of the United States was drawn in question. One of the grounds for denial of the plaintiffs' claim in the case was the application of the Statute of Limitations, and the court held that while the constitutionality of the act containing a limitation clause

was not involved, the construction of the statute itself was drawn in question, this court saying:

"The ground, among other grounds, in defeat of plaintiff's action, that the claim was barred by the act of June 11, 1870, was indeed sustained, but that was a matter of *construction*, and the constitutionality of the act, if held to apply to the claim rather than to the amenability of the United States to suit, was not considered."

In the case of *Pettit vs. Walshe*, 194 U. S., 205, the jurisdiction of this court on appeal from the circuit court depended upon whether or not the construction of a treaty was drawn in question in the determination of the case. On page 216 this court said:

"The appellee contends that this case only involved a construction of certain acts of Congress, and that, therefore, this court is without jurisdiction to review the judgment on direct appeal from the circuit court. * * * We do not concur in this view. The treaties of 1842 and 1889 are at the basis of this litigation, and no effective decision can be made of the controlling questions arising upon the appeal without an examination of those treaties and a determination of the meaning and scope of some of their provisions. A case may be brought directly from a circuit court to this court if the construction of a treaty is therein drawn in question."

The language of section 250 of the Judicial Code differs from that in which appellate jurisdiction is given to this court from a State court, where the defendant has asserted a right or immunity under a Federal statute, yet the two provisions are similar, in that they give a right of review to this court where in the lower court the defendant has called in question the construction of a statute of the United States.

In a very recent case, involving the right to writ of error to the Supreme Court of the State, this court said:

"The defendant relied upon the act of Congress as a defense and is entitled to come to this court."

Sage vs. Hampe, 235 U. S., 99.

In this case there was cited *Nutt vs. Knut*, 200 U. S., 12, where is found a large collation of authorities in support of the appellate jurisdiction of this court.

Clearly, then, where the defendant has called to its aid the construction of a law of the United States of general application, it has called that construction in question. It is not necessary that it challenge the correctness of the construction theretofore placed upon the statute, but if it asserts the law and relies upon the construction of the same, the defendant has called it in question and made it a part of the case as an element in the determination of the same.

In the light of the pleadings and the law applicable to the question under discussion, inasmuch as the defendant in error asserted and relied upon "the act of Congress entitled 'An Act to Regulate Commerce,'" as amended in its defense to the action, it called the construction of that statute in question within the meaning of the sixth clause of section 250 of the Judicial Code, under the terms of which this court has jurisdiction by writ of error to review the final judgment of the Court of Appeals.

Sane v. Hozland, 244 U. S. 174.

Validity of Authority Drawn in Question.

The Supreme Court of the United States also has appellate jurisdiction under the fifth section. The phraseology of this clause is found for the first time in a statute governing appeals and writs of error from the Court of Appeals of the District of Columbia, although the first part of said section, to wit, "in cases in which the validity of any authority exercised under the United States is drawn in question," is found in a prior statute creating the Court of Appeals and governing appeals and writs of error from that court to the Supreme Court (section 8, act Feb. 9, 1893, 27 St. L., 436,

ch. 74; U. S. Comp. St., 1901, page 573), and the meaning of that phrase has been the subject of frequent consideration by this court. The ruling invariably has been that the existence, legality, or constitutionality of the authority must form a substantial issue and be the subject of a direct inquiry in order for the authority to be drawn in question within the meaning of the phrase (*United States vs. Lynch*, 137 U. S., 280; *New Mexico ex rel. McLean vs. The Denver & R. G. R. R. Co.*, 203 U. S., 38).

It has further been held that an authority exercised under the United States is not drawn in question every time an act done under that authority is disputed (*Cook Co. vs. C. & D. Co.*, 138 U. S., 635); or when the manner of the exercise of an existing and legal authority and not the authority itself is drawn in question (*U. S. ex rel. Taylor vs. Taft*, 203 U. S., 461); or when only the judicial construction of the authority granted and not the existence, legality or constitutionality of the authority is questioned (*United States ex rel. South Carolina vs. Seymour*, 153 U. S., 353).

In other words, there must be a denial of the existence of the authority or its legality or constitutionality, if it exists; in short, the validity of the authority itself as distinguished from its construction or manner of exercise must be drawn in question to give this court jurisdiction.

We contend that this case comes within the principle announced in *United States vs. Lynch*, *supra*; *Interstate Commerce Commission ex rel. Humboldt Steamship Company*, 224 U. S., 474; *United States ex rel. Steinmetz vs. Allen*, 192 U. S., 543, and similar cases.

This contention is based upon the fact that the Interstate Commerce Commission held that the overcharges here involved were "barred from" its "consideration," and that in so holding it exercised a judgment and discretion which the relator denied to exist. In other words, the Commission claimed the existence of an authority from the Act to

Regulate Commerce to exercise a judgment and discretion whether or not it would consider on its merits a claim for overcharges filed within two years after the payment of the overcharges, and this relator denied the existence of any such authority, and contended that under the Act to Regulate Commerce there existed no authority in the Commission to exercise a discretion in matters pertaining to its jurisdiction; but that by virtue of the act it was bound to take jurisdiction of the claim and consider same on its merits. The existence of an authority and the right to act thereunder was claimed on the one side and denied on the other, and such existence was a direct and substantial question in the Supreme Court of the District of Columbia and the Court of Appeals. Not only was "the construction of a statute of the United States drawn in question by the defendant," but the validity, that is, the existence and legality of an authority exercised under the United States was drawn in question.

It was urged in the court of first instance and again in the Court of Appeals that there exists nowhere in the Act of Congress an authority in the Commission to refuse to consider on its merits, and therefore take jurisdiction of, a claim for overcharges filed within two years after payment of same. This contention was based upon the holding of this court in the Humboldt Steamship case, *supra*, in which this court affirmed a judgment of the Court of Appeals of the District of Columbia reversing the judgment of the Supreme Court, which had held that the Interstate Commerce Commission had authority to exercise a judgment and discretion, whether or not it would take jurisdiction and consider on its merits a claim filed before it against certain carriers. The Commission had refused to take jurisdiction of a claim against carriers operating in Alaska upon the ground that the Act to Regulate Commerce gave it no jurisdiction over them, and dismissed the petition of the Humboldt Steamship Company, which had invoked its jurisdic-

tion. Thereupon the United States, on relation of the Steamship Company, filed its petition for a writ of mandamus in the Supreme Court of the District of Columbia to compel the Commission to take jurisdiction, but the court dismissed the petition and on appeal to the Court of Appeals the judgment of the Supreme Court was reversed and on writ of error to this court the said Court of Appeals was affirmed. This court held that the Commission had no authority to refuse to take jurisdiction of a claim asserted under the Act to Regulate Commerce and no power or authority to exercise discretion in matters affecting its jurisdiction. In the course of its opinion this court said:

"The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties but its functions are defined, and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances. It may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

So, in the present case, it was contended that the Commission had no power, no authority, to exercise a judgment and discretion and refuse to take jurisdiction of the relator's claim, and when it did refuse to take jurisdiction and consider the claim on its merits it exercised a power and an authority it did not have and therefore the existence or validity of this authority exercised under the United States was drawn in question.

In the case of *United States vs. Lynch, supra*, the court says:

"The validity of a statute or the validity of an authority is drawn in question when the existence or constitutionality or legality of such statute or authority is denied and the denial forms the subject of a direct inquiry."

In that case the contention was made that the authority of the auditor of the Treasury of the United States was drawn in question by his refusal to allow the relators' claim for mileage, but this court said that the auditor had the right and authority to act in the premises and when he did act, although he may have acted erroneously, that the validity or existence of his authority was not drawn in question. In the present case the objection is not to the manner of action by the Commission under a concededly existing authority, but the objection is to the exercise of an authority to refuse to take jurisdiction and consider a claim on its merits when no such authority exists in the Commission. Therefore the validity of authority claimed by the Commission was directly in issue in the lower court.

In the case of *Pickering vs. Lomax*, 145 U. S., 310, it was held that the validity of an authority exercised under the United States was involved in a case which turned upon the question whether or not the President of the United States could, under an act of Congress prohibiting the conveyance of Indian lands except by his permission, approve an Indian deed thirteen years after its execution. In that case, as in the present case, there was a denial of the existence of the authority claimed under an act of Congress to do a certain thing.

The facts of the instant case are analogous to those in United States *ex rel.* *Steinmetz vs. Allen*, *supra*, in which the validity of a regulation established by the Commissioner of Patents under authority of the United States statutes for conduct of proceeding in the Patent Office was assailed, and this court held that in such a case "the validity of an authority exercised under the United States was drawn in question" within the meaning of the statute giving the right of appeal in such cases from a final judgment of the Court of Appeals of the District of Columbia to the Federal Supreme Court. Here, as there, a ruling of a subordinate governmental body made under a statute of the United States ap-

plicable to said body was asserted as being without, and hence beyond the authority of said body, and here as there, an authority exercised under the United States was denied to exist and it was therefore drawn in question. Indeed, this was the very issue tried by the Supreme Court of the District of Columbia when petition was made before that body for a writ of mandamus against the Commission. The respondent stated in its answer to the said petition that the matters and things heard and determined by it in the case of this petitioner against the Louisville & Nashville Railroad Company were and are matters exclusively within its jurisdiction and power to determine under and by virtue of the act of Congress entitled "An Act to Regulate Commerce" as amended. The relator took issue with the respondent upon this allegation, and briefed and argued the question whether there existed any authority in the Commission to exercise a discretion or judgment in the question of taking jurisdiction of the relator's claim on its merits.

There was then involved in the mandamus suit the question of the existence and hence the validity of an authority exercised under the United States within the meaning of clause 5 of section 250 of the Judicial Code by virtue of which the plaintiff in error respectfully suggests this court acquired jurisdiction, to say nothing of the basis therefor under clauses 1 and 6 of the same section of the Judicial Code.

II.

LIMITATION CLAUSE MISCONSTRUED.

It Was Error to Hold that the Claim Was "Barred from Consideration."

The facts being admitted, the only question here presented is as to when the statute of limitation begins to run. The language of this statute, as found in section 16 of the Act to Regulate Commerce, is as follows:

"All complaints for the recovery of damages shall be filed with the Commission within two years *from the time the cause of action accrues* and not after."
(Italics supplied.)

As heretofore stated, the Commission in its opinion in the instant case does not discuss the question, but dismissed it with the statement that "The Commission holds that the date the cause of action accrues is the date of the delivery of the shipment," and cites the case of Blinn Lumber Co. *vs.* Southern Pacific Co., 18 Interstate Commerce Commission Reports, 430. We must look there for the reasons upon which the Commission bases its ruling. Prior to the opinion in the Blinn case, *supra*, which was handed down May 9, 1910, the Commission had held in a long line of decisions in accordance with our contention, that is, that "a cause of action *accrues*, as that phrase is used in the act, *on the date the freight charges are actually paid*." This was the original or contemporaneous construction.

M. & M. Grain Co. *vs.* St. L. & L. Y. R. R. Co., 16 I. C. C., 385.

Kile & Morgan Co. *vs.* Deepwater Ry. Co., 15 I. C. C., 235.

Pleasant Hill Lbr. Co. *vs.* St. L. & L. W. Ry. Co., 15 I. C. C., 532.

Two Commissioners dissented from the opinion in the Blinn case, and these, Commissioners Cockrell and Prouty, were two of the ablest lawyers that have ever sat on the Commission. The majority opinion admits that, "it is the common-law rule that a cause of action does not accrue until actual payment has been made, so that there may be a basis in law for recovery," but holds that this rule of law is "by necessary implication revoked as to interstate carriers under the mandatory requirements of this act." The alleged "mandatory requirement," referred to, is that the carrier collect of all alike its published rate or be subject to certain penalties, but no time is fixed in the act for such collection.

The Commission further seeks to justify its departure from the rule of law as to when a cause of action accrues purely upon considerations of expediency and public policy. This, we submit, is remedial legislation not only independent of Congress, but directly contrary to the positive enactment of Congress, and therefore beyond the power of the Commission.

The dissenting opinion of Commissioner Cockrell, in which Commissioner Prouty concurs, so ably answers the argument of the majority opinion that we here quote from it freely:

"That the carrier must collect its lawful charges I entirely agree, but I find no time limit upon such duty other than the various statutes of limitation in force in the several States. Subject to the restrictions and penalties contained in the Act to Regulate Commerce and the Elkins Act, carriers may collect their published rates either:

"1. At the time the shipment is tendered for transportation; or—

"2. At the time the shipment is delivered to the consignee; or—

"3. They may extend reasonable, but not unduly preferential, credit to an approved or bonded shipper for such freight charges.

"The extension of credit for freight charges to one shipper and the denial of such credit to others is undoubtedly a preference to the one and a disadvantage to the others; but whether the preference is due or undue, whether the disadvantage is reasonable or unreasonable, is a matter of fact.

"I can find no provision in the interstate commerce law requiring the carriers to collect the lawful tariff charges upon the delivery of the shipment or to refuse an extension of time to the shipper for paying the charges, or to modify the common-law duties of the carriers to collect the published tariff charges in effect at the time the shipment moves. If it collects unjust or unreasonable charges to the damage of the shipper, then the question arises, when does the shipper's cause of action for the recovery of such damages accrue? The statute is very plain.

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues.

"Not 'within two years from the time the shipment moved;' not 'within two years from the time the carrier was entitled to demand payment;' but 'complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues.'

"The phrases 'recovery of damages' and 'cause of action accrues' are perfectly plain and well-understood terms of law, and they are to be interpreted in a reasonable sense, such as must have been in the mind of the legislature when they were used. The Commission in January, 1908, published the following:

"'A cause of action accrues, as that phrase is used in the act, on the date the freight charges are actually paid.

"'In the memorandum entitled: "When a Cause of Action Accrues under the Act to Regulate Commerce," 15 I. C. C. Rep., 201, decided February 2, 1909, the Commission reaffirmed this interpretation of the statute, and held:

"'In complaints for the recovery of damages caused by charges of rates unjust or unreasonable or

unjustly discriminatory or unduly preferential or prejudicial, the cause of action accrues when the payment is made. In any other complaints for the recovery of damages for alleged violations of the interstate commerce laws, of which this Commission has jurisdiction, the cause of action accrues when the carrier does the unlawful act or fails to do what the law requires, on account of which damages are claimed.'

"That the present report is intended as remedial legislation appears upon its very face. It says:

"'Unless this position is taken by the Commission and such construction of the act given, there can be no such thing as a rebate so long as a running account is maintained between the shipper and the rail road.

* * * * *

"'We regard as the evident intention of Congress: That the period of two years within which this Commission is allowed to award damages for acts arising under violations of the provisions of this act begins to run at the time when the shipment is delivered and when it becomes the legal duty of the carrier to collect its lawful charges. Under this interpretation the Act to Regulate Commerce becomes workable and enforceable from the standpoint of shipper, carrier and the Commission itself.'

"If this be the evident intention of Congress, then it would appear that Congress was very unfortunate in the choice of words. It would have been easy to express such intention by saying, 'within two years from the time the shipment is delivered.'"

This question has also been passed upon by the Commerce Court in *Arkansas Fertilizer Co. vs. United States*, decided December 5, 1911, Opinion No. 42. Two members of the court, Judges Knapp and Mack, held that the Commission had not erred in its construction of the statute, and therefore that the petition seeking to review the order should be dismissed; and Judge Archibald concurred in the order dismissing the petition, but on other grounds, and expressly refused to pass on the question of limitation. The two other mem-

bers of the court, Judges Carland and Hunt, dissented, holding that the limitation ran from the time of payment, and that therefore the Commission had erred in its construction of the statute.

The construction of this section of the Act to Regulate Commerce has never been passed upon, except by the Commission and by the Commerce Court, in the case above cited. We have seen that the Commission for a long time put the construction on the statute for which we here contend, but, finally, in the Blinn case, *supra*, reversed its own contemporaneous construction of the statute and all its former rulings were overruled, yet, with two Commissioners dissenting, only four judges of the Commerce Court have passed on the question, and of these two support our construction and two the last construction of the Commission.

The rule at law, that a cause of action to recover money paid accrues when the payment is made, is too well established to justify citation, or that this is the rule is admitted by the majority of the Commission in their opinion in the Blinn case, and by Judges Knapp and Mack in their opinion in *Arkansas Fertilizer Co. vs. United States*, *supra*, in which they uphold the construction of said majority. But it is argued that, notwithstanding this rule at law, it is necessary to depart from it in construing this act in order to prevent unjust discrimination; that if a carrier is permitted to extend credit to a favored shipper it could thereby keep alive the favored shipper's cause of action to recover an unreasonable rate until after other shippers were barred. This is the first reason given for the changed construction put upon this section of the act by the Commission, and this argument, it seems to us, is conclusively answered by the dissenting opinion of Commissioners Cockrell and Prouty, above quoted. It is there pointed out that there is no limitation in the act upon the time in which a carrier may collect its charges and the carrier may lawfully, and they uniformly do, extend credit to approved or bonded shippers and whether the preference is undue or fraudulent is a matter of fact to be determined in

each case. We submit that the fear that in some cases undue preference or discrimination may result is no justification for construing the act contrary to the generally accepted meaning of the language used by Congress and to what is admitted to be the construction that should otherwise prevail. On this point the dissenting opinion of Judge Carland in the Arkansas Fertilizer case, *supra*, is very persuasive. He says:

"It is urged that to leave it to the carrier and shipper to determine when the payment of the excessive freight rate shall be made permits the carrier and shipper to wait until all other shippers have paid their charges and then take up the matter of reparation with the particular shipper who has been given a long credit, and thus to bring about a preference or discrimination, and perhaps a form of rebate. But even if this is so, a fear on the part of the Commission that discriminations and rebates may result from a construction of the statute different from the one established in the Blinn case is no reason for giving a meaning to the statute at variance with all precedent. The Commission at one time decided, contrary to its former rulings, that it was illegal for a carrier to pay the actual cost of elevating grain at a transfer point, and one of the grounds of this decision was the fear on the part of the Commission that this payment would open the door for the payment of rebates and undue discriminations; but the courts seem to have held that the fear that some illegal practice might result was no reason for condemning a practice otherwise honest and lawful. (Interstate Commerce Commission, appellant, *vs.* F. H. Peavey & Co. *et al.*, decided by the Supreme Court Nov. 13, 1911)." (222 U. S., 42.)

Surely it is not necessary to put this unnatural construction on this provision of the act in order to prevent undue discrimination by extension of credit, and if the Commission had to rely upon this method to prevent such discrimination it would find it most ineffective. If a carrier knowingly grants to a shipper, with intent to prefer said shipper, an unreasonable credit which does result in an undue discrim-

ination, it is liable to indictment and punishment under section 6 of the "Act to Regulate Commerce." *United States vs. Hocking Valley Ry. Co.*, 194 Fed., 234.

Can it then be said that a construction of the provision of this section of the act, contrary to the plain terms thereof, is justified in order to enable the Commission to thereby accomplish one of the great purposes of the act, when that purpose can be more effectively accomplished under the provisions of another section of the act?

Even if the law did provide that the published rate must be paid at the time of delivery of shipment, to hold that damages for charging an unreasonable rate may not be recovered unless claim therefor is filed within two years from delivery of shipment would be to put upon the shipper the entire burden due to a carrier's error in not collecting the full rate within two years, although the shipper may be wholly innocent of the fact that the carrier has made the error.

The second reason advanced for departing from all precedent in arriving at the meaning of this section of the act is, that the obligation to pay the published rate, whether reasonable or unconscionable, is a statutory obligation, and cannot be waived by the carrier or evaded by the shipper; and that, since the obligation to pay is thus fixed and cannot be evaded, it will be conclusively presumed, in a suit to recover damages, that the payment was made at the time the shipment was delivered. We agree that the payment must be made before suit can be brought, but that is the only limitation as to the time payment must be made. The statute fixes no time for the payment of the published charges. If the act provided that the published rate must be collected upon delivery of the shipment, there might be some force in this argument, but since the act does not so provide it should not be read into the statute for the purpose of depriving injured shippers of rights expressly given therein. Nor has the Commission itself sought to read this into the act, except in this connection.

The third and last reason advanced for departing from the established rule in construing this section of the act is, that the shippers' cause of action for damages is based upon the existence, at the time the claimant's shipments move, of an unreasonable published rate; that the real cause of action is the publication of a rate that is unlawful because excessive, and it "accrues" as to a particular shipper when his property is transported under that rate. But this reasoning leaves out of view the fact that the "Act to Regulate Commerce" provides for two separate and distinct causes of action growing out of the maintenance by an interstate carrier of an unlawful rate. The first of these is a cause of action for reduction of the rate for the future, and as to it there is no limitation. The second is for recovery of damages and this action must be brought in two years from the time the cause of action accrues, *i. e.*, two years from the time the damage is suffered. The causes of action are separate and distinct. They may be joined or may be brought separately and independent of each other. *Mitchell Coal & Coke Co. vs. Pennsylvania R. R. Co.*, 230 U. S., 247; *Lehigh Valley Railroad Co. vs. Meeker*, 211 Fed. Rep., 785.

Moreover, it is provided that the injured shipper may bring suit either before the Commission or in a United States District Court for his damages, but it has been held that a suit to recover damages for the charging of an unreasonable rate cannot be maintained until the Commission has first condemned the rate as unreasonable. *Texas & Pacific Railroad Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 406.

Much reliance is placed upon the last-cited case as justifying the construction put by the Commission upon the provisions of the act in the case at bar. The Abilene case, in deciding that the Commission must first declare a rate unreasonable before a shipper can maintain a suit at law to recover damages for the charging of said rate, holds that section 22 of the act—which provides that nothing therein "shall in any way abridge or alter the remedies now existing at com-

mon law or by statute, but the provisions of this act are in addition to said remedies"—can not be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the statute. This holding was necessary to give effect to the chief purpose of the act which was to make the Commission the sole judge as to the reasonableness of rates. Had the court held that the courts could still hold a rate unreasonable and award damages thereon the whole purpose of the act would have been destroyed.

We concede that if it were necessary, in order to accomplish the purpose of the act, to put the unusual construction which the Commission has put on the section here involved, that the court would be justified in upholding same. But it cannot be said that any purpose sought to be accomplished by the act will be injuriously effected by giving to this section the meaning which all admit it has at law. The only purpose of the act which it is contended will be injuriously effected by such a construction is the purpose to prevent discrimination. We have already seen that this does not follow from the construction for which we contend, as it does not deprive the Commission of the power to refuse to award damages, if there has been collusion or fraud, which is the only circumstance under which discrimination could arise therefrom.

In discussing this attempt to apply the doctrine of the Abilene case, Judge Carland, in his dissenting opinion in the Kansas Fertilizer case, said:

"I am of the opinion that the attempt to apply the law as stated in *T. & P. Ry. Co. vs. Abilene Cotton Oil Co.* (204 U. S., 426) is beside the question, as in the case at bar it is simply a question of the proper construction of an ordinary statute of limitation in which the construction of no other portion of the law seems to be involved."

We submit that none of the three reasons given for the ruling complained of are sound, and that at least they do not justify a construction, which is not only contrary to the admitted meaning of the act under established rules of law, but also deprives claimants of a right expressly granted.

This Court Has Said that the Cause of Action Accrues When the Overcharge is Collected.

In the case of *A. J. Phillips Company vs. Grand Trunk Western Railway Company*, 236 U. S., 662, the question of limitation under section 16 of the Act to Regulate Commerce was presented and considered by this court. There the complaint was filed with the Commission less than two years after the order of the Commission condemning the rate as unreasonable had been finally sustained by the courts, but more than two years after the payment of the charges. The distinction here sought to be made between delivery of shipment and payment of charges was not there presented, but this court held *that the cause of action accrued under the statute when the charges were collected.*

The defendant in error in that case had collected a rate which had afterwards been held by the Commission to be unreasonable in a proceeding to which plaintiff in error was not a party. Subsequently plaintiff in error filed suit in the Federal court to recover the charges paid by it in excess of the rate fixed by the Commission as reasonable. It was contended that plaintiff in error could not rely on the proceeding before the Commission, instituted by others, and that its claim was barred by the limitation imposed by the statute. After holding that the proceeding before the Commission was of a public nature and that plaintiff and all other shippers were entitled to the benefit of the finding therein, the court, coming to a consideration of the question of limitation, said:

"But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. *When the overcharge was collected a cause of action at once arose*, and the shipper at once had the right to file a complaint, or to intervene in proceedings instituted by others. If he failed to take either of those steps, and there was a finding of unreasonableness in the proceedings begun by others, he could, if in time, present his claim, and await the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid, he would then be in position to obtain reparation from the Commission—or a judgment from a court of competent jurisdiction, on a claim that had been seasonably presented. But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that

"all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action *accrues*, and not after, provided that claims accrued prior to the passage of this act may be presented within one year' (34 Stat. at L., 590, chap. 3591; Comp. Stat., 1913, sect. 8584).

"In the present case the overcharges were *made and paid* prior to August, 1904. The present suit was brought May 9, 1909, less than two years after • the validity of the Commission's order was sustained by the Supreme Court, but more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose. * * *

"For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as a matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for *overcharges collected* more than four years prior to the bringing of this suit, it was proper to dismiss the action." (Italics supplied.)

It will be seen that the court says that the cause of action "*accrued when the overcharge was collected,*" and, again, "the carrier not being liable to the plaintiff for *overcharges collected* more than four years prior to the bringing of the suit, etc."

We suppose that when the court used this language, in a case where it was contended that the action to recover excessive charges accrued at some period *after* the collecting of the charges, that it did not apprehend that it would ever be contended before it that the cause of action to recover excessive charges accrued at a period *before* the charges were collected.

III.

JURISDICTION OF TRIAL COURT.

Limitation Clause of the Act to Regulate Commerce Fixing the Time Within Which a Claim Must Be Filed with the Interstate Commerce Commission, a Governmental Body, Relates to the Jurisdiction of that Body and Therefore an Erroneous Construction of the Statute of Limitations Holding a Claim to be Barred from Consideration of the Commission is a Denial of Jurisdiction Because of a Misunderstanding of Law.

In the case of *Ford vs. United States*, 116 U. S., 213, Ford presented a claim against the United States for the destruction of property during the Civil War. By a resolution of the Senate, the claim was referred to the Court of Claims "relieved from the bar of the statute of limitation." A petition was filed before the Court of Claims, but the action was dismissed because barred by the Statute of Limitations. On appeal to this court, it was held that the clause of the statute which invests the Court of Claims with jurisdiction of claims referred to it by either House of Congress is subject to other

clauses defining its jurisdiction and fixing the period within which all claims must be asserted against the United States. The court, speaking through Mr. Justice Harlan, says:

"The clauses of the statute investing that court (Court of Claims) with jurisdiction to hear and determine all claims referred to it by either house of Congress are matters to be interpreted in the light of other clauses defining its jurisdiction, and fixing, in respect of all claims, a period within which they must be asserted against the United States."

In the case of *Finn vs. United States*, 123 U. S., 231, it is held that the statute fixing the time within which a claim may be asserted against the Government in the Court of Claims is *jurisdictional*. The court, after holding that the claim therein set up was barred by the Statute of Limitations, says:

"The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that, except where the claimant labors under some one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant or be presented to the proper department for settlement within six years after suit could be commenced thereon against the Government. Under the appellant's theory of the case, the Second Comptroller could open the case twenty years hence, and upon the claim being transmitted by the Secretary of the Treasury to the Court of Claims, the court could give judgment to defendant against the United States. We do not assent to any such interpretation of the statutes defining the powers of that court."

In the case of the *United States vs. Wardwell*, 172 U. S., 52, this court speaking through Mr. Justice Brewer, says:

"Section 1069, Revised Statutes, is not simply a statute of limitations, but also jurisdictional in its nature and limits the cases of which the Court of Claims can take cognizance."

See also

Watts *vs.* United States, 123 Fed., 114.

United States *vs.* Lippitt, 100 U. S., 668.

The above decisions have very pertinent application to the case at bar. The Interstate Commerce Commission is a governmental body intrusted by Congress with certain administrative powers conferred and limited by the Act to Regulate Commerce, and with certain duties to perform as therein enumerated. Among the duties imposed upon the Commission, is the awarding of damages for any violation of an act by a common carrier of interstate commerce. The claim for damages, however, must have accrued within two years before the filing of the complaint to recover same. If the claim has not accrued within two years before the filing of the complaint, then the Commission has no authority or power to make an award therefor; and, even according to the Commission itself, *the period of limitation contained in the Act to Regulate Commerce is not a matter that can be waived by the parties or which is necessary to be pleaded by the carrier.*

In *Blinn Lumber Co. vs. Southern Pacific Co.*, *supra*, the Commission says that it was the evident intention of Congress,

"That the period of two years within which the Commission is *allowed* to award damages for acts arising under violations of the provisions of this act begins to run at the time when the shipment is delivered."

The act itself is an enabling statute, creating the Commission and defining its duties and powers so that the limi-

tations clause in essence pertains to the jurisdiction of the Commission.

Like the statute limiting the time within which a claim can be asserted before the Court of Claims, the limitation clause of the Act to Regulate Commerce is *jurisdictional*. It limits the claims which can be asserted before the Commission or considered on their merits by that body. If, then, the Commission so erroneously construes the limitation clause of the Act to Regulate Commerce as to deny its power thereunder to consider a claim filed before it, it denies its own jurisdiction to act, and does, because of a mistake of law, absolutely refuse to act.

In such a case, this court, in the Humboldt Steamship case, has unequivocally said that mandamus lies to compel the Commission to act, that is, to proceed to a consideration of the claim on its merits, its manner of acting being left to its own discretion.

The Supreme Court of the District of Columbia Has Power in This Case to Correct Error of the Interstate Commerce Commission and by Mandamus Compel It to Take Jurisdiction of Relator's Claim and Consider Same on Its Merits.

The case of Interstate Commerce Commission *vs.* United States of America *ex rel.* Humboldt Steamship Co., 224 U. S., 474, we deem decisive of the above question. In that case this court says:

"The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to his or its discretion."

This court has held in many other cases that mandamus lies to compel a public functionary or tribunal to perform

some duty required by law, where the party seeking relief has no other legal remedy.

Marbury vs. Madison, 1 Cranch., 163.

Knox Co. vs. Aspinwall, 24 How., 376.

U. S. ex Rel. Lewis vs. Boutwell, 17 Wall., 604.

U. S. ex Rel. Steinmetz vs. Allen, 193 U. S., 543.

At the outset, then, the question of the Commission's powers is logically presented. If the Commission is not acting within the discretionary powers conferred upon it by Congress in refusing to consider the relator's claim for overcharges; but was, by the terms of that act, as this court construes the same, obliged to take jurisdiction of the claim and dispose of it on its merits, then a ministerial duty was imposed upon the Commission, which is properly enforced by the writ of mandamus.

The Error of the Commission Was Not Committed in the Exercise of a Lawful Judgment or Discretion.

It is our contention that, while the Commission has the right and duty to use judgment and discretion in the exercise of the jurisdiction conferred on it by the Act to Regulate Commerce, it has no discretion in determining the extent of the jurisdiction so conferred; if it falls into error in determining its jurisdiction, the courts will direct and control it. If this position be not correct, then the Commission may nullify any provisions of the act by holding, "in the exercise of its discretion," that it confers no powers, since there is no right of review by appeal or writ of error.

The legislative branch of the Government alone can exercise judgment or discretion in fixing the jurisdiction of the Commission. When Congress has acted, all questions of public policy and of enforcing judgment and discretion with reference thereto are at an end. It is for the Commission to enforce the act of Congress while the courts interpret and

construe it. In other words, as we see it, Congress makes the law, the courts interpret it, while the sole duty of the Commission is to enforce it, as so made and interpreted.

We believe that the many cases that have come before this court, involving the powers and duties of the Commission, establish that the Commission is purely an administrative body with quasijudicial powers and is vested with certain discretionary powers, not subject to review by the courts. Such is the principle of those cases where the determination is dependent solely upon the facts, the finding of the Commission in such cases being final and binding upon both shipper and carrier, with certain exceptions. If the conclusion or order of the Commission be negative, there is no right of review in the courts at the instance of the shipper. If the order be affirmative, then it is subject to attack by the carrier upon the grounds that the Commission acted in violation of constitutional prohibition, in excess of its statutory authority, and that its action is without any basis in the evidence. Subject to these three limitations, the Commission has full discretion in those cases which depend on facts alone for their solution. In such cases only administrative questions are involved, which are exclusively in the power of the Commission. Thus, in the case of *Pa. R. R. Co. vs. Int. Coal Co.*, 230, U. S., 184, 196, Mr. Justice Lamar, delivering the opinion of this court, says:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon the difference in conditions are not matters of law. So far as the determination depends upon facts no jurisdiction to pass upon the administrative question involved has been conferred upon the courts."

We conceive such cases to be the limit of the Commission's discretionary powers. In matters pertaining to its jurisdiction, it has no discretion whatever. It is so expressly decided by this court in the *Humboldt Steamship* case, *supra*, in which it is said:

"The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasijudicial duties, but its functions are defined and, in the main, explicitly directed, by the act creating it. It may act on its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and it may be, cannot be controlled in either. But if it absolutely refused to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed?"

The Court of Appeals for the District of Columbia, in the opinion in the case denying the petition for a writ of mandamus, holds in effect that the above decision is not applicable here because the court says:

"It (the commission) took jurisdiction of the complaint, but refused the order for the payment of same because, in its opinion, it was barred by the limitation provided in the act.

"It was the duty of the Interstate Commerce Commission to determine the question whether the claim was barred by limitation and it did so in accordance with former decisions of the same tribunal. Whether its decision is right or wrong is not the question.

* * *

"There may have been error in its adjudication of the question of limitation but that error we cannot review."

We respectfully submit that the Court of Appeals was grievously in error in holding either that the Commission

took jurisdiction of the claims for overcharges held to be barred or that the Commission has the authority to construe the Act to Regulate Commerce by virtue of which it was created and under which it acts, in any way it pleases, without being subject to judicial restraint. If this court shall decide that the act does not bar claims for overcharges paid within two years before filing complaint with the Commission, was it not and is it not mandatory upon the Commission to enforce the act in compliance with what this court shall determine to have been the legislative will? If such be the mandate of Congress, which the Commission is bound to obey, may it erroneously construe the law, and then say that the exercise of a so-called discretionary power, by virtue of which it makes the erroneous decision, defeats the only process (mandamus) by which any judicial tribunal can correct the error and thus provide for carrying out the legislative intent? Is the Commission vested with such a discretion that it may construe the act in any way it may see fit, even though such construction be plainly erroneous and clearly violative of the legislative will, and yet it be beyond the power of the court to correct the error and to compel the Commission to enforce the act according to its terms. We do not believe that such error of law divests this court of the power to require, by mandamus, enforcement of a statute according to the intent of Congress. This court has often said that, "There is no place in our constitutional system for the exercise of arbitrary power."

Garfield *vs.* U. S. *ex rel.* Goldsby, 211 U. S., 249, 262.

The decision of the Commission was not that the relator had not been damaged by the overcharge, a question of fact exclusively within the Commission's discretion. On the contrary, it was that under its interpretation of the law or its construction of the act, it could not consider the overcharge paid by the relator on February 8, 1911.

By such a decision the Commission not only closed the

door to its consideration of the claim on its merits, but it did so on a theory of construction of the statute by which it undertook frankly to substitute its judgment as to the requirements of a sound public policy for the judgment and discretion of the legislative branch of the Government. We submit that this is worse than judicial legislation, for it is legislation by commission in the face of plain provisions of an act of Congress.

In the case of *Blinn Lumber Co. vs. Southern Pacific Co.*, 18 I. C. C. Rep., 430, which is the precedent on which the decision by the Commission in the case at bar is expressly founded, the majority of the Commission frankly based its conclusions on what it regarded as a wise public policy and admitted that "under the rule at law, a cause of action does not accrue until payment is made." In a vigorous dissenting opinion, two of the Commissioners stated that, while they agreed with the majority on a matter of policy and would join in such a recommendation to Congress, they could not substitute their judgment for the judgment of Congress which had been aptly expressed in terms that had a well-understood meaning in law.

Since it appears that the Commission did undertake to legislate and thereby change the terms of the act, it becomes necessary to inquire into its power to do so. Section 12 of the Act to Regulate Commerce provides:

"The Commission is hereby authorized and required to execute and enforce the provisions of this act."

This language is not permissive, nor does it merely give the Commission license or leave to enforce the act. The Commission is "required," that is, compelled to "execute," which means to carry out and enforce the act. It cannot execute and enforce some of the provisions and ignore or change others, but must enforce all.

In *Interstate Commerce Commission vs. C., N. O. & T. P.*

Railway Co., 167 U. S., 479, 501, this court, in considering the power given to the Commission, said:

"The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative."

It is argued that the Commission did take jurisdiction, since it held hearings, considered briefs and arguments and rendered an opinion. This same contention was made and rejected in the Humboldt Steamship case, *supra*, in which the court said that while there may be jurisdiction to determine jurisdiction, yet this doctrine does not apply in its proposed sense to administrative officers; that the Interstate Commerce Commission is purely an administrative body and that if it "deny its power from a misunderstanding of the law it cannot be said to exercise discretion."

In the case of *Roberts vs. United States*, 176 U. S., 221, 231, this court very clearly states the power of an administrative body to construe the statutory provision under which it acts, saying,

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the

officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

"In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

Lawrence v. Hargrave, 244 U. S. 174.

In the case of *Kendall vs. United States*, 12 Pet., 524, the Postmaster General undertook to examine certain contracts for the transportation of mail entered into between his predecessor in office and relators and ordered that certain allowances and credits theretofore made relators under said contracts be withdrawn. Thereupon a memorial was presented to Congress and a law passed referring the matter to the Solicitor of the Treasury for his determination, and requiring the Postmaster General to credit the relator with whatever sums the Solicitor of the Treasury should find them entitled to. The Solicitor made his finding allowing relators \$161,563.89. The Postmaster General credited relators with part of this sum, but refused to credit them with \$39,462.43. A writ of mandamus was then obtained compelling the Postmaster General to credit the relators with the whole of this sum. Upon appeal to this court the Postmaster General contended that the Solicitor's award was not

a final adjudication, but on the contrary he construed the act to leave him, by reason of his office, the power to finally pass upon the question. This court held he was mistaken in his construction of the act; that he had no discretion in the matter, but was bound by the act of Congress to perform a duty, and non-performance subjected him to mandamus.

That case has very clear application here, as the Commission has construed the Act to Regulate Commerce to withhold from its consideration claims for overcharges on shipments delivered more than two years before the filing of the complaint, although payment of the overcharges was made within two years. This construction was made of language having a well-established meaning in law, and is in spite of that meaning and the intention of Congress as the Commission practically admits, but it says it is within its discretion to construe the act and that its discretion cannot be controlled by the courts. We say that the act makes it clearly the duty of the Commission to entertain and consider on their merits all claims for overcharges paid within two years before the filing of the complaint, and leaves no discretion to the Commission as to when it shall act and for non-performance of its duty it is subject to mandamus.

If the "cause of action" to recover overcharges does not accrue until the overcharges are paid, and the Commission is required to execute the provisions of the act, then was it not clearly the duty of the Commission to consider relator's claim upon its merits, and could it be said to execute the act by denying its power to consider the claim when the claim is one which it is clearly the Commission's duty under the act to consider?

It is not barred from the Commission's consideration by any language of the act, as that language was used and intended by Congress, nor by any legal construction ever put upon same. Will, then, the Commission be allowed to so interpret the act as to say what are or what are not proper claims for its consideration? Is it not the duty of the Com-

mission to consider on its merits every claim for overcharges accruing within two years before the filing of the complaint, the date the cause of action accrues being a matter for Congress to decide, and when it does so decide and expresses its decision in unmistakable terms and in language of long-established and accepted meaning, is there any discretion left to the Commission to give the language used a different meaning, thereby substituting its will for that of Congress, and then say that the courts cannot interfere because it has exercised a discretion. We say it has no discretion in this particular, only a duty and that that duty is plain and is enforceable by mandamus.

In the case of *American School of Magnetic Healing vs. McAnnulty*, 187 U. S., 94, the Postmaster General had ordered the postmaster at Nevada, Mo., not to deliver any mail to the complainants upon the ground that their business was a fraud and they were using the mails to obtain money under false pretences, and that under the statutes, as he construed them, he had the authority and it became his duty to prevent such use of the mails by refusing to deliver any letters to the complainants. The latter sought an injunction against the postmaster at Nevada, Mo. A demurrer to the complainant's bill was sustained in the lower court. Upon appeal to this court the defendant contended that he acted under the order of the Postmaster General, who made the same in the exercise of his discretionary powers in construing the statute under which he acted. In granting an injunction this court held that the Postmaster General had no power under the law to say that complainant's business was fraudulent, and said:

"The facts which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, there-

fore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withdrawn."

Just as in the above case, an injunction issued to restrain the action of an executive, where on admitted facts the executive, by a mistake of law, had acted, so in the case at bar is mandamus proper to compel action by an administrative body, where that body refuses to act or consider a claim presented to it when the facts are admitted, but by a mistake of law the body adjudges it has no power to act or to consider the claim. Such action or nonaction is unauthorized by law and in violation of the rights of the relator. To compel action by the Commission in the performance of its duty imposed by the Act to Regulate Commerce, mandamus is the proper remedy.

In the case at bar the Commission did everything in a proper manner, except for its final holding that the claim was "barred from our consideration." This conclusion it reached, it says, in the exercise of a lawful discretion; but, we submit, that such a construction is without any legal excuse therefor, and that any such course in connection with a judicial or quasijudicial proceeding for which there is no legal excuse is subject to the control of the courts by mandamus.

It was so held in the case of *West vs. Hitchcock*, 19 App. D. C., 333, in which the Court of Appeals of the District of Columbia says:

"The fact that an act which mandamus seeks to compel is the culmination of a series of proceedings of a judicial or quasijudicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ

of mandamus, when the officer or person charged to perform it arbitrarily or without just legal cause refuses such legal performance."

Citation of Court of Appeals Inapplicable.

In the Humboldt Steamship Company case (224 U. S., p. 474) the Supreme Court of the District of Columbia held that it had no power on writ of mandamus—

"to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

In that case the Court of Appeals, agreeably to its decision last cited above,—

"took a different view of the power of the courts to compel action upon the part of the Commission, and reversed the judgment of the Supreme Court and remanded the cause, 'with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission, requiring it to take jurisdiction of said cause and proceed therein as by law required.'"

In affirming this judgment of reversal, in the opinion of this court quoted in part above, it affirmatively appears that after the petition of the shipper was filed before the Commission—

"The companies proceeded against filed answers. There were intervening companies on both sides of the controversy.

A hearing was assigned and had in October, 1909, and subsequently, July 6, 1910, the Commission decided that it was 'without jurisdiction to make the order sought by the complaint,' etc.

In the face of such positive, pertinent and indubitable authority for the character of relief sought in the case at bar the Court of Appeals, apparently upon a failure to distinguish between this and the Riverside Oil Company case, utterly rejected and disregarded the decision of this court in the Humboldt Steamship Company case. We again quote two sentences and a citation from the concluding part of the Court of Appeals' decision in the case at bar.

"Mandamus is not the proper writ to control the judgment and discretion of an executive tribunal in the decision of a matter, the decision of which is by law imposed upon it. * * * Riverside Oil Co. vs. Hitchcock, 190 U. S., 316, 325.

"There may have been error in its adjudication of the question of limitation, but that error we cannot review."

There are certain important distinctions between the basic character of the jurisdiction of the Secretary of the Interior as to public lands involved in the Oil Company case and that of the Interstate Commerce Commission, especially on questions of law.

So long as the legal title to public land remains in the United States the jurisdiction of the Secretary of the Interior, as head of the Land Department, over such lands is exclusive, while with the Commission the jurisdiction is limited by the terms of the Act to Regulate Commerce as amended.

In the Oil Company case, while it was averred that the relator had parted with consideration which it was the duty of the Secretary of the Interior to recognize as a foundation in law for a conveyance of certain *public land*, the proposed writ was aimed at the *Government land while remaining within the exclusive jurisdiction of the Land Department*, and the Secretary not only did not deny his jurisdiction over the subject-matter, but asserted, agreeably to decisions of this court, his exclusive jurisdiction over the same.

7y

Recently this Court has gone to the point of granting mandamus in a land case.

Lane vs. Hoglund. 244 U. S. 174.

In the case at bar the controversy with the defendant in error has arisen for the sole reason that it denied its own jurisdiction over the subject-matter of the claim.

Instead of applying the decision of this court bearing directly upon such a case the Court of Appeals has allowed itself to look to, as controlling authority, this land case, where the Secretary of the Interior not only had jurisdiction of the subject-matter, but also exclusive jurisdiction which, according to the decisions of this court, he could not lose until after the issuance of a patent conveying the fee to some grantee of the United States. Then, and not until then, according to the decisions of this court in land cases, do the courts acquire jurisdiction to review and correct the errors of law committed by the Land Department in erroneously disposing of public land. It is hard to conceive of an authority on the point less applicable to the case at bar.

It is respectfully submitted that, under the authority of the Humboldt Steamship Company case, *supra*, mandamus was the proper remedy, and the defendant in error having denied its own jurisdiction of the claim upon an error of law, the judgment of the Supreme Court of the District of Columbia should have been reversed, "with directions to issue a peremptory writ of mandamus directed to the defendant in error, requiring it to take jurisdiction of the cause and proceed therein as by law required."

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Counsel for Plaintiff in Error.

FEB 8 1918

JAMES D. WAHER,
CLERK.

No. 8 **70**

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES OF AMERICA EX REL. LOUIS-
VILLE CEMENT COMPANY, PLAINTIFF IN ERROR,

v.

INTERSTATE COMMERCE COMMISSION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE
COMMISSION.

JOSEPH W. FOLK,

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Counsel for the Interstate Commerce Commission.

SYNOPSIS AND INDEX.

	Page.
STATEMENT OF FACTS.....	1-12
PROCEEDINGS BEFORE THE COMMISSION.....	2-7
PROCEEDINGS IN COURT.....	7-12
ARGUMENT.....	12-31
I. THE JUDGMENT OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA MAY NOT, IN THIS CASE, BE REVIEWED BY WRIT OF ERROR.....	12-19
II. A RULING BY THE COMMISSION, IN A CAUSE OF WHICH IT HAS JURISDICTION, IS NOT SUBJECT TO REVIEW BY MANDAMUS.....	19-25
III. THE RULING OF THE COMMISSION WAS NOT ARBITRARY.....	26-31
CONCLUSION.....	31-32
27109-18-1	(1)

TABLE OF CASES.

	Page.
<i>Armour Packing Co. v. United States</i> , 209 U. S. 50.....	28
<i>Blinn Lumber Co. v. Southern Pacific Co.</i> , 18 I. C. C. 430.....	5-9-26-31
<i>Broun v. Hitchcock</i> , 173 U. S. 473.....	22
<i>Carlisle v. Waters</i> , 7 App. D. C. 517.....	22
<i>Champion Lumber Co. v. Fisher</i> , 227 U. S. 445.....	15-16
<i>Decatur v. Spaulding</i> , 14 Pet. 497.....	20
<i>Ewing v. Fowler Car Co.</i> , 244 U. S. 1.....	24
<i>Ex parte Park Square Automobile Station</i> , 244 U. S. 412.....	24
<i>Ex parte Roe</i> , 234 U. S. 70.....	23
<i>Foreman v. Meyer</i> , 227 U. S. 452.....	16
<i>Illinois Central R. Co. v. Adams</i> , 180 U. S. 28.....	13
<i>In re Key</i> , 189 U. S. 84.....	22
<i>Int. Com. Com. v. Humboldt Steamship Co.</i> , 224 U. S. 474.....	9-10-22
<i>Knight v. Lane</i> , 228 U. S. 6.....	22
<i>Lane v. Mickadiet</i> , 241 U. S. 201.....	23
<i>La Roque v. United States</i> , 239 U. S. 62.....	32
<i>Linford v. Ellison</i> , 155 U. S. 503.....	14
<i>Lochren v. Long</i> , 6 App. D. C. 486.....	22
<i>Marian Coal Co. v. Delaware, L. & W. R. Co.</i> , 27 I. C. C. 441.....	5
<i>Marion v. Hanan</i> , 14 Allen 522.....	18
<i>New Mexico ex rel. McLean v. Denver & R. G. R. Co.</i> , 203 U. S. 38.....	14
<i>New York, N. H. & H. R. Co. v. Int. Com. Com.</i> , 200 U. S. 361.....	28-31
<i>Riverside Oil Co. v. Hitchcock</i> , 190 U. S. 316.....	12-21-22-25
<i>Seymour v. South Carolina</i> , 2 App. D. C. 240.....	22
<i>Snow v. United States</i> , 118 U. S. 346.....	14
<i>South Carolina v. Seymour</i> , 153 U. S. 353.....	19-21
<i>Texas & P. Ry. Co. v. Abilene Cotton Oil Co.</i> , 204 U. S. 426.....	29
<i>United States v. Clark</i> , 96 U. S. 37.....	18
<i>United States v. Lynch</i> , 137 U. S. 280.....	14-20
<i>United States v. Schurz</i> , 102 U. S. 378.....	22
<i>United States ex rel. Dunlap v. Black</i> , 128 U. S. 40.....	22
<i>United States ex rel. Ness v. Fisher</i> , 233 U. S. 683.....	23
<i>United States ex rel. Red River Lumber Co. v. Fisher</i> , 39 App. D. C. 181.....	22
<i>Venner v. Great Northern Ry. Co.</i> , 209 U. S. 24.....	13
<i>Woodward & Dickerson v. Louisville & N. R. Co.</i> , 15 I. C. C. 170.....	5
<i>Youngblood v. T. & P. Ry. Co.</i> , 21 I. C. C. 509.....	5

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES OF AMERICA EX REL. Louisville Cement Company, Plain- tiff in Error,	} No. 326.
v.	
INTERSTATE COMMERCE COMMISSION.	

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE
COMMISSION.

STATEMENT OF FACTS.

This case is here on writ of error to review the judgment of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District of Columbia dismissing a petition for writ of mandamus filed in that court by the plaintiff in error. The courts below held

that on an application for mandamus the court could not review and reverse a ruling of the Interstate Commerce Commission in a proceeding where the Commission had taken jurisdiction and decided the case.

PROCEEDINGS BEFORE THE COMMISSION.

On the 15th day of November, 1911, the plaintiff in error filed a complaint with the Interstate Commerce Commission, hereinafter called the Commission, against the Louisville & Nashville Railroad Company, hereinafter called the railroad company, to recover reparation for alleged unreasonable rates charged by the railroad company upon shipments of coal over part of its line "during the period from July 23, 1906, to April 9, 1907." (Record, p. 8.) The total sum claimed was \$1,930.90, made up as follows: (1) sums paid currently upon shipments moving during the period from February 1 to April 10, 1907, aggregating \$595.65; and (2) a single item of \$1,335.25 paid to the railroad company February 8, 1911, the aggregate of undercharges upon shipments which had moved during the period from July 22, 1906, to February 10, 1907. The facts were admitted. (Record, p. 9.)

The record shows that on July 22, 1906, prior to the shipments in question, the railroad company established a rate on coal from Jellico and Woodbine, Kentucky, to Speeds, Indiana, of \$1.10 per ton,

thereby increasing its former rate 10 cents per ton. The plaintiff in error made shipments of coal between the points named from July 22, 1906, to February 10, 1907, and the agent of the railroad company, not knowing, it is alleged, that the rate had been raised, charged, and the plaintiff in error paid, \$1 per ton upon all shipments moving during that period. From February 10 to April 10, 1907, the \$1.10 rate was charged and collected. It is alleged by the plaintiff in error, and admitted by the railroad company, that the increase of the rate from \$1 to \$1.10 was a mistake which was corrected by the tariff published and effective April 10, 1907. (Record, p. 5.) The Commission found that the rate of \$1.10 was unreasonable during the time it was in effect to the extent that it exceeded \$1. (Record, p. 9.)

On April 19, 1907, the plaintiff in error addressed a letter to the Commission, which was received April 22, complaining that the \$1.10 rate was unreasonable and stating that it had been published by mistake; that the \$1 rate had been restored, and asking whether the Commission would authorize a refund of the excess of 10 cents per ton *which had been paid* by the plaintiff in error upon shipments moving from February 10 to April 10, 1907, provided the railroad company would join in the application for such refund. On April 22, 1907, the Commission advised the plaintiff in error that if the railroad company would file with the Commission an admission that the rate between the points

in question was increased through error and ask authority to refund the amounts paid in excess of \$1 per ton during the period named the subject would receive consideration; but if the railroad company was not willing to submit the case in this manner *it would be necessary* for the plaintiff in error to file a formal complaint. (Record, p. 9.)

No further communication was received by the Commission until the plaintiff in error filed its complaint November 15, 1911. In its report (Record, p. 9) the Commission, referring to its letter of April 22, 1907, and summarizing the facts, said:

It appears that complainant at once took the matter up with the officials of the Louisville & Nashville upon receipt of the Commission's letter. The Louisville & Nashville refused to submit the case to the Commission until complainant had paid undercharges on shipments which had been made during the period from July 22, 1906, to February 10, 1907, amounting to \$1,335.25. The amount of reparation sought by complainant on shipments made after the \$1.10 rate was collected was \$595.65. The result of continued negotiations between complainant and the Louisville & Nashville was that in February, 1911, the complainant paid the carrier \$1,335.25; *and complainant now asks the Commission for an order for reparation in the sum of \$1,930.90.* [Italics ours.]

Upon these admitted facts the Commission held that the \$1.10 rate was unreasonable to the extent

that it exceeded \$1, and then said (Record, pp. 9, 10):

The Commission holds that the date the cause of action accrues is the date of the delivery of the shipment. *Blinn Lbr. Co. v. S. P. Co.*, 18 I. C. C. 430. The filing with the Commission of a letter which gives the name of the complainant, the shipments on which reparation is asked, the points of origin and destination, and the rates on which the claim is based, is held to be sufficient to stop the running of the statute. *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 I. C. C. 170; *Younghlood v. T. & P. Ry. Co.*, 21 I. C. C. 569; *Marian Coal Co. v. D. L. & W. R. R. Co.*, 27 I. C. C. 441. The letter written by complainant and filed with the Commission April 22, 1907, referred only to shipments made by complainant from February 1, 1907, to April 10, 1907. This letter gave sufficient details with respect of the shipments made between the dates named to stop the running of the statute. No complaint was filed by complainant with reference to shipments made before February 1, 1907, until the petition here in question was filed on November 15, 1911; and these shipments had all been delivered more than four years before the filing of that petition. They are therefore barred from our consideration.

With respect to the shipments that moved after February 1, 1907, and up to April 10, 1907, a different situation is presented.

Complaint was filed with the Commission with respect to these shipments within the statutory period. That the complaint was not promptly prosecuted before the Commission was due, apparently, to negotiations that were had between the complainant and the Louisville & Nashville. There is no indication in the record that complainant ever abandoned its claim for reparation with respect to the shipments which moved during the period covered by the letter filed April 22, 1907. Under these circumstances we hold that as to shipments made by complainant during the period from February 1, 1907, to April 10, 1907, the complaint was filed in time to stop the running of the statute. * * * From this record, however, the amount of the reparation can not be ascertained. The complainant should prepare a statement showing as to each shipment the date of delivery of the shipment, weight, car number, and the amount of reparation asked on the basis above indicated. This statement, together with the freight bills, should be presented to the defendants for verification by them. When the statement has been so prepared and verified it should be forwarded to the Commission with the freight bills, when the matter will be taken up with a view to the issuance of an order for reparation.

The evidence called for having been filed, the order of reparation was granted on June 8, 1914.

(Record, pp. 16, 17.) The report of October 7, 1913, is "referred to and made a part" of the order. Following the report and conclusions regarding the statute of limitations, the item of \$1,335.25 was disallowed and reparation granted for \$595.15. (Record, pp. 16, 17.)

PROCEEDINGS IN COURT.

On April 17, 1914, before the order was entered, the plaintiff in error filed in the Supreme Court of the District of Columbia a petition for mandamus against the Commission. After referring to the proceedings before the Commission the petition states, *inter alia* (Record, pp. 4, 6):

V. The petitioner states that the relief sought by its petition to the Interstate Commerce Commission in case No. 5356 filed November 15, 1911, was an award of reparation or damages on certain shipments of coal from Jellico, Kentucky, and Woodbine, Kentucky, to Speeds, Indiana, made between July 28, 1906, and April 9, 1907; * * *.

VI. Petitioner is advised that as a matter of law the cause of action set forth in its petition to respondent accrued when the alleged unlawful charge was paid and not when the shipments were delivered, and petitioner is further advised *that its letter to respondent under date of April 19, 1907, was sufficient to stop the running of the period of limitation as to all claims arising out of the erroneous publication of the rate of \$1.10 therein referred to.*

Petitioner is also advised that the said respondent has *exclusive jurisdiction* in respect to numerous provisions of the said Act to Regulate Commerce and *particularly with respect to the award of damages for a violation of said act*; and that respondent is charged with the duty of executing and enforcing each and every provision of said act; that when specifically charged with such duty said respondent can exercise no discretion in respect thereto. [*Italics ours.*]

The final prayer for relief is as follows (Record, p. 7):

4. That this Court issue the peremptory writ of mandamus directed to the respondent commanding and directing it to execute and enforce the said act, and particularly in respect to requiring the defendants in case No. 5356 to take jurisdiction as required by the Act to Regulate Commerce, of petitioner's claim for damages on account of alleged overcharge on shipments moving between July 28, 1906, and February 11, 1907, said overcharge having been paid by petitioner to the Louisville & Nashville Railroad Company on the 8th day of February, 1911, and petitioner having filed its petition to recover damages on account of said overcharge on the 15th day of November, 1911.

The Commission entered its order June 8, 1914, after the petition for mandamus had been filed. (Record, p. 16.)

The contention of the plaintiff in error in the Supreme Court of the District of Columbia was that the Commission erred in holding that part of its claim (\$1,335.25) was barred by the statute of limitations, basing its claim to a writ of mandamus upon *Int. Com. Com. v. Humboldt Steamship Co.*, 224 U. S. 474.

The Supreme Court of the District, the late Mr. Justice Anderson presiding, said (Record, pp. 17, 18):

This is a suit for a mandamus to require the Interstate Commerce Commission to reverse its ruling that, under the following provision contained in paragraph 16 of the act approved Feb. 4, 1887, entitled "An act to regulate commerce" (24 Stat. L. 379), the limitation of action begins to run from the time delivery of the shipment is made, and not from the date of payment of the freight. The provision or limitation in question reads:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after."

The ruling which is here objected to is the same as that made by the Commission in *Blinn Lumber Co. v. Southern Pacific Co. et al.*, 18 I. C. C. Rep. 430 (decided May 9, 1910), in which the subject is fully discussed and the reasons for the construction given are stated. * * *

In this state of the record, this Court is asked to review and reverse, by mandamus, the ruling of the Interstate Commerce Commission which is complained of. The relator relies upon *Int. Com. Com. v. Humboldt Steamship Co.*, 224 U. S. 474, which holds that mandamus will lie if the Commission, "from a misunderstanding of the law" should "absolutely refuse to act," that is, refuse to take jurisdiction or proceed in a case at all. In this Humboldt Case, the Supreme Court of the United States clearly distinguishes between cases where a tribunal refuses to take jurisdiction, and those where it takes jurisdiction and the objection made is only as to the manner in which it is exercised. The case at bar seems to clearly belong to the latter class, and the ruling complained of involves the exercise of judgment and discretion, which, though properly reviewable on appeal or writ of error were there any provision therefor, can not be reviewed by mandamus. Then, again, even were the ruling complained of properly reviewable by mandamus, the ruling should not be reversed unless the Court is of opinion that the ruling is clearly wrong. The Court is not of that opinion; and, therefore, the application for mandamus is denied, and the petition dismissed.

From this decision an appeal was taken to the Court of Appeals of the District of Columbia, and in an opinion rendered by the late Chief Justice

Shepard December 11, 1914, the judgment of the Supreme Court of the District was affirmed. After reciting the facts, the appellate court, in its opinion, said (Record, pp. 23, 24) :

It appears from the foregoing statement that the Interstate Commerce Commission entertained the petition of the relator, awarding the payment of a part of his damage but denying the sum of \$1,335.25 for excess charges for freight delivered from July 22, 1906, to February 10, 1907, because in the opinion of the Commission that payment was barred by limitation, which it held had begun to run from the date of the delivery of the freight instead of from the date of payment. The relator's contention is that the Interstate Commerce Commission *declined to take jurisdiction of the claim for \$1,335.25* by reason of its error in the determination of the limitation. * * *

The Interstate Commerce Commission is an administrative body with certain judicial functions. In the exercise of these functions, it is called upon to exercise judgment and discretion. *It took jurisdiction of the complaint, but refused the order for the payment of part of the same because, in its opinion, it was barred by the limitation provided in the act.* It was the duty of the Interstate Commerce Commission to determine the question whether the claim was barred by limitation, and it did so in accordance with former deci-

sions of the same tribunal. Whether its decision is right or wrong is not the question. This court has no general supervisory power over the Interstate Commerce Commission by which to control its action upon questions within its jurisdiction. Mandamus is not the proper writ to control the judgment and discretion of an executive tribunal in the decision of a matter the decision of which is by law imposed upon it. It can not be made the substitute for a writ of error. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 325. [Italics ours.]

ARGUMENT.

I.

The judgment of the Court of Appeals of the District of Columbia may not, in this case, be reviewed by writ of error.

Counsel, page 12 of their brief, base their right to a writ of error upon subsections 1, 5, and 6 of section 250 of the Judicial Code.

Subsection 1 authorizes a writ of error "In cases in which the jurisdiction of the trial court is in issue; * * *."

Counsel for plaintiff in error attempt to show by a quotation, too much abbreviated, of an allegation in paragraph 1 of its petition, and by reference to the denial of that allegation by the Commission in its answer, that the "jurisdiction"

of the trial court was put in issue. The allegation in paragraph 1 of the petition (Record, p. 2) is that the court "has original jurisdiction in mandamus *for and in respect to matters and things in this petition hereinafter set forth.*" [Italics ours.] It was this allegation as a whole that was denied in the answer. The jurisdiction of the trial court over petitions for mandamus against the Commission *on a proper showing* was not denied.

The phrase "jurisdiction of the trial court" is used in the statute in its legal sense and means authority to hear and determine a cause. This Court in *Venner v. Great Northern Ry. Co.*, 209 U. S. 24, 34, quoting from *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 34, said:

Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence.

In the case at bar, the courts below took jurisdiction of the cause, heard the case, and decided that upon the showing made by the plaintiff in error the writ could not issue. This was a determination of the case upon its merits.

Subsection 5 authorizes a writ of error "In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question."

The authority of the Commission to consider and grant reparation for violations by interstate carriers of the Act to regulate commerce is not questioned. The Commission took jurisdiction and considered the entire claim for reparation. The facts material to the determination of the issues were admitted. The Commission allowed part of the claim and held that the statute of limitations had run against the balance.

“ The validity of any authority exercised * * * or the existence or scope of any power or duty ” of the Commission was not involved. The sole controversy discussed and determined as to that part of the claim which was disallowed was whether the statute of limitations had run against it.

The validity and not the construction only of a statute, or of any authority exercised thereunder, must be directly drawn in question to authorize the writ of error. *Snow v. United States*, 118 U. S. 346, 353; *Linford v. Ellison*, 155 U. S. 503, 508-9; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.*, 203 U. S. 38, 47.

In *United States v. Lynch*, 137 U. S. 280, 285, an act of Congress providing for traveling expenses was under consideration. The accounting officer of the Treasury had disallowed a claim and the writ of mandamus to compel the allowance had been denied. It was claimed that the accounting officer had not properly construed the act of Congress under which the claim for mileage was

made. This Court, speaking through the Chief Justice, said:

In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statutes are controverted, nor is the validity of an authority every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence or constitutionality or legality of such statute or authority is denied and the denial forms the subject of direct inquiry.

In *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 450, 451, 452, the right to review on writ of error under section 250 of the Judicial Code is fully considered. Speaking through Mr. Justice Day, this Court, referring to the fifth subsection, said:

“ Drawn in question ” is a phrase long used in other statutes of the United States regulating appellate jurisdiction.

And, after reviewing the former decisions, said:

It has also been held that the validity of a statute of the United States or authority exercised thereunder is drawn in question *when the existence or constitutionality or legality of such law is denied and the denial forms the subject of direct*

inquiry in the case. * * * The petitioner's real attack upon the action of the Secretary and Commissioner was *because the facts shown did not warrant the exercise of the power given by law.* The decision of that issue, upon which it is clear the case turned, neither involved nor decided the questions which make the case appealable to this court under the fifth clause of section 250 of the Judicial Code. [Italics ours.]

In the case of *Foreman v. Meyer*, 227 U. S. 452, 455, this Court denied a writ of error to review a petition for mandamus to compel the Secretary of the Navy to record the name of the petitioner upon the register of retired officers of the Navy. The petitioner claimed the right under a statute of the United States. The Acting Secretary of the Navy held that the petition did not come within the statute. This Court, speaking through Mr. Justice Day, said:

This case, like the one just decided, *Champion Lumber Co. v. Fisher*, ante p. 445, is sought to be brought here under section 250 of the Judicial Code because it is said to be a case in which the validity of an authority exercised under the United States or the existence or scope of the power or duty of an officer of the United States is drawn in question. From what we have said of the character of the case made and decided, we think it is apparent that no such validity was drawn in question, nor was the existence or

the extent or scope of the power or duty of an officer of the United States challenged or decided.

The validity, or existence, or extent, or scope "of the power or duty of" the Commission was not challenged in the case at bar.

Section 16 of the Act to regulate commerce provides:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, * * *.

The only issue was, When does a cause of action accrue? In answering this question the "validity of any authority" of the Commission is not "drawn in question."

Subsection 6 of section 250, Judicial Code, gives jurisdiction in any case "in which the *construction* of any law of the United States is drawn in question *by the defendant*." [Italics ours.]

The limitation clause in section 16 does not require any construction. It is plain and unambiguous. The controversy before the Commission required a determination of the question as to when the "cause of action" arose in this case. Upon that question the statute throws no light. It states a point of time, "the time the cause of action accrues," from which the limitation begins to run. An action for reparation, for an unreasonable rate, accrues under the Act when the amount of the charge is determined by the Act.

A cause of action accrues when a legal right of action thereon is complete. Words and Phrases, volume 2, page 1015. Thus, in a case where an officer of the United States claimed credit for money lost by robbery, it was held by this Court that the statute of limitations did not begin to run until the accounting officer had refused to give the officer credit and the money was requested of him. *United States v. Clark*, 96 U. S. 37. In reference to the right of a *cestui que trust* to recover a trust estate, it was held that the cause of action did not accrue until the trustee had unequivocally repudiated the trust and claimed to hold the estate as his own. *Marion v. Hanan*, 14 Allen, 522.

Other instances might be given showing that the time when a cause of action accrues depends upon the circumstances and facts of each case or class of cases.

In the case at bar the question determined was whether, under the Act to regulate commerce, the cause of action for reparation for an unreasonable rate accrued when the charge was paid or when the shipment was delivered to the consignee and the charge became a *fixed charge* beyond the power of the carrier or the shipper to change. Under the Act, when the shipment is delivered the tariff rate applicable to the transportation is fixed beyond any possible recall by the carrier or by any agreement between the carrier and shipper. The right to bring an action for the tariff rate then accrues.

There is no ambiguity in the statute upon this point; no "construction" is called for. *South Carolina v. Seymour*, 153 U. S. 353. It is a question of law whether the *letter of the common law rule*, holding that an ordinary statute of limitations begins to run from the date of the payment, shall be applied to reparation cases or whether the fact that the cause of action is complete when the shipment is delivered to the consignee shall be the point of time when the special limitation begins to run. No "construction" of the limitation clause can determine this question. It is simply a matter of *applying* the statute to the facts of the case.

We submit, therefore, that the plaintiff was not entitled to a writ of error for review of the judgment of the Court of Appeals of the District of Columbia under the subsections referred to.

II.

A ruling by the Commission, in a cause of which it has jurisdiction, is not subject to review by mandamus.

It is admitted that the Commission has jurisdiction to hear and determine complaints by shippers, claiming that rates which have been charged them by carriers were unreasonable, and to order reparation. This authority is contained in sections 15 and 16 of the Act to regulate commerce. The complaint in the case at bar was of this character and asked for reparation to the extent of \$1,930.90. The Commission took jurisdiction of the complaint, gave a full hearing, and decided the entire

case. In deciding the case it became necessary to determine, as to one item, when the two-year statute of limitations began to run. The ruling upon this question was incidental and necessary to the determination of the cause. The Commission ruled that the cause of action accrued when the amount of the charge was fixed and determined beyond the power of change by the carrier or the shipper; that a right of action then accrued—(1) to the carrier to collect any unpaid freight bill, and (2) to the shipper to complain of the unreasonableness of the charge. When the delivery is made the transportation service is ended, and nothing remains to be done but to charge and pay the published rate applicable to the transportation. This ruling, we submit, can not be reviewed on a petition for mandamus.

In *United States v. Lynch*, 137 U. S. 280, 286, where an officer of the United States Treasury, charged with the duty of auditing accounts, had disallowed an item and the writ of mandamus was refused to compel the allowance of the account this Court, speaking through Mr. Chief Justice Fuller, and referring to a former decision (*Decatur v. Spaulding*, 14 Pet. 497, 515), said:

* * * while the court would not be bound to adopt the construction given, when departmental decisions are under review in a proper case, the court would not by mandamus control the exposition of statutes by direct action upon executive officers.

In *South Carolina v. Seymour*, 153 U. S. 353, 360, this Court, speaking through Mr. Justice Gray, referring to the above case, said:

* * * that if the judgment should be reversed upon the ground urged, it would not be for want of power in these officers to audit and pass upon the account, *but because they had disallowed what they ought to have allowed*, and erroneously construed what needed no construction. [Italics ours.]

In *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 323, 324, 325, involving a decision in a land case by the Land Department, this Court, speaking through Mr. Justice Peckham, said:

Their solution was properly submitted to the Land Department, which had full and complete jurisdiction over the matters arising * * * and it thereby became the duty of the officers of that Department to decide them.

* * * * *

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands.

Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an

official duty which requires the exercise of his judgment and discretion.

* * * He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.

* * * *Whether he decided right or wrong, is not the question.* Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. [Italics ours.]

To the same effect are the following cases: *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 48; *In re Key*, 189 U. S. 84, 85; *United States v. Schurz*, 102 U. S. 378, 396; *Brown v. Hitchcock*, 173 U. S. 473; *Knight v. Lane*, 228 U. S. 6; *Seymour v. South Carolina*, 2 App. D. C. 240; *Lochren v. Long*, 6 App. D. C. 486, 504; *Carlisle v. Waters*, 7 App. D. C. 517, 523, 524; *United States ex rel. Red River Lumber Co. v. Fisher*, 39 App. D. C. 181, 183, 184.

In *Int. Com. Com. v. Humboldt Steamship Co.*, 224 U. S. 474, 484, relied upon by the plaintiff in error to support its proposition, this Court, speaking through Mr. Justice McKenna, said:

The general principle which controls the issue of a writ of mandamus is familiar.
* * * It may be directed against a tribunal or one who acts in a judicial ca-

capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. [Italics ours.]

In *Ex parte Roe*, 234 U. S. 70, 73, this Court, speaking through Mr. Justice Van Devanter, said:

The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction,
* * *

In *Lane v. Mickadiet*, 241 U. S. 201, 204, 207, 208, 210-211, this Court, speaking through the Chief Justice, said:

The relators, * * * invoked the aid of the trial court to control by mandamus the action of the Secretary of the Interior concerning an allotment in severalty of land made to an Indian in pursuance of the authority conferred by the act of February 8, 1887 * * *.

* * * As there is no dispute, and could be none, concerning the general rule that courts have no power to interfere with the performance by the Land Department of the administrative duties devolving upon it, however much they may when the functions of that Department are at an end correct as between proper parties errors of law committed in the administration of the

land laws by the Department, it must follow unless it be that this case by some exception is taken out of the general rule *that there was no power in the court below to control the action* of the Secretary of the Interior and reversal therefore must follow.

* * * * *

It follows from what we have said that the court below was without jurisdiction to control the conduct of the Secretary concerning a matter within the administrative authority of that officer and therefore that the mandamus was wrongfully allowed * * *. [Italics ours.]

See also *Ewing v. Fowler Car Co.*, 244 U. S. 1; *Ex parte Park Square Automobile Station*, 244 U. S. 412.

The act creating the Commission, section 16, as amended, provides:

That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

* * * All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, * * *.

It is clear from the powers expressly conferred by the Act, as construed by this Court, that it became the duty of the Commission to determine when the action accrued as a necessary incident to the exercise of its powers under the statute above quoted. In performing that duty the Commission held that the action accrued at "the date of the delivery of the shipment," when the amount to be paid by the shipper was fixed. To compel the Commission by mandamus to reverse its decision would be repugnant to the express decision of this Court in *Riverside Oil Co. v. Hitchcock*, *supra*, where the Court, referring to a decision by the Secretary of the Interior, said, page 325:

If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make.

To the same effect, see *United States ex rel. Ness v. Fisher*, 233 U. S. 683, 693-4.

We submit that the Commission can not be compelled by mandamus to reverse its decision in a cause of which it has and took jurisdiction, and in which it determined the issues involved.

III.

The ruling of the Commission was not arbitrary.

The reasons for the ruling are found in *Blinn Lumber Co. v. Southern Pacific Co.*, 18 I. C. C. 430. The common-law rule is considered and stated thus, page 432:

The theory of the common law permitted carriers to make private contracts for transportation, which contracts were evidenced by the bills of lading given to the shippers. Under this practice charges varied as between shippers, and the fullest freedom was exercised to "trade" in transportation.

Under that rule the right to barter or compromise charges existed to the very date of actual payment. It could not be determined therefore, under the common-law rule, whether a charge was unreasonable until the charge had been definitely fixed and paid. The theory of the common law also was that the party had the right to recover for money paid and received for his benefit. The report says further, pages 432, 433, 434:

The abuses arising under such conditions led to the enactment of the Act to regulate commerce. * * * The bill of lading became at once little more than a receipt for the goods to be transported, into which could be legally incorporated nothing obnoxious to the law. It was therefore placed beyond the power of the agent of a corporation carrier, or of any other officer thereof, to bind the

carrier to any rate other than that applicable, under the filed tariffs, to the traffic accepted for transportation.

* * * * *

* * * The reciprocal rights and duties of the shipper and carrier are fixed by the tariffs at the time of movement, and being so fixed they remain unalterable save in so far as the Commission is empowered to extend relief for violations of law.

The extending of credit to favored shippers, thereby postponing the date of actual payment, may result in the unlawful discrimination which the Act to regulate commerce was framed to prevent. The report proceeds, pages 434-435:

Furthermore, if a carrier may for an indefinite period waive its right to collect at the time of delivery the lawful charge, and thus postpone the action of the statute of limitations, the Act becomes practically valueless to the shipper as a means of recovering unreasonable charges through this Commission. * * * we regard as the evident intention of Congress: That the period of two years within which this Commission is allowed to award damages for acts arising under violations of the provisions of this Act begins to run at the time when the shipment is delivered and when it becomes the legal duty of the carrier to collect its lawful charges. Under this interpretation the Act to regulate commerce becomes workable and enforceable from the standpoint of shipper, carrier, and the Commission itself.

There is nothing harsh in this rule. A shipper who does not promptly pay the lawful rate accepts his own risk, knowing that the time for appeal to this Commission is running against him. He has but two years in which to make that appeal. The same period is fixed as to all other shippers. Plainly an award to one shipper under such circumstances as are presented in this case would effect discrimination as against all other shippers who did not refuse to pay the lawful rate, and as to whom the statute of limitations has now run. By any other construction of the law we would be placing a premium upon the refusal of shippers to pay charges when due, and would be putting it into the power of the carriers to give to favored shippers a secure and certain advantage.

The reasons of the common-law rule do not apply to a complaint for reparation on the ground that an unreasonable rate has been charged. As already noted, when the transportation is completed, and not until then, because the shipment may be reconsigned in transit to another point of destination, the amount of the charge becomes fixed beyond any change by agreement between the carrier and the shipper. *New York, N. H. & H. R. Co. v. Int. Com. Com.*, 200 U. S. 361; *Armour Packing Co. v. United States*, 209 U. S. 56.

Section 6 of the Act requires that the published rate shall be strictly observed:

* * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *.

In construing the law regulating commerce it must be borne in mind, as clearly stated by this Court, speaking through the Chief Justice, in *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 439:

That the Act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. * * * And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. * * * When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation,

but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

Referring to a provision in section 22, reserving the common-law remedy, it is stated in the opinion above quoted, page 446:

This clause, however, can not in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act can not be held to destroy itself.

In view of the law as stated and construed by this Court, the amount of the charge for transportation becomes fixed and determined beyond all possible change, except by action of the Commission, when the transportation has ended, that is, when the shipment has been delivered to the consignee. Upon the happening of that event, the carrier has a right of action for the published rate applicable to the transportation and the shipper has the right to complain to the Commission if the rate is unreasonable. This conclusion leads inevitably to another, which is, that the action having accrued, the two-year statute of limitations begins to run. As stated in the *Blinn Case, supra*, no other construction of the statute can protect against favoritism and unjust discrimination and

make the Act workable in attaining its great objects.

CONCLUSION.

The ruling of the Commission in the *Blinn Lumber Company Case* has been adhered to and applied since May 9, 1910. We believe the ruling is sound doctrine, which is in entire harmony with the law, and with the spirit and purposes of the Act to regulate commerce. But even if this should be doubtful, the statement of this Court in *New York, N. H. & H. R. Co. v. Int. Com. Com.*, 200 U. S. 361, at pages 401-402, is appropriate and applicable. In that case, referring to a former decision by the Commission, this Court, speaking through Mr. Justice White, now Chief Justice, said:

Now, without at all intimating that as an original question we would concur in the view in the case last cited * * * and without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the Act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, be-

cause we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of the statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable in the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the Act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with.

See also *La Roque v. United States*, 239 U. S. 62, 64.

In view of this, and the other authorities cited in this brief, we submit that the Commission should not be compelled by mandamus to change its ruling.

Respectfully submitted.

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